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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 456.

THE UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, APPELLANTS,

vs.

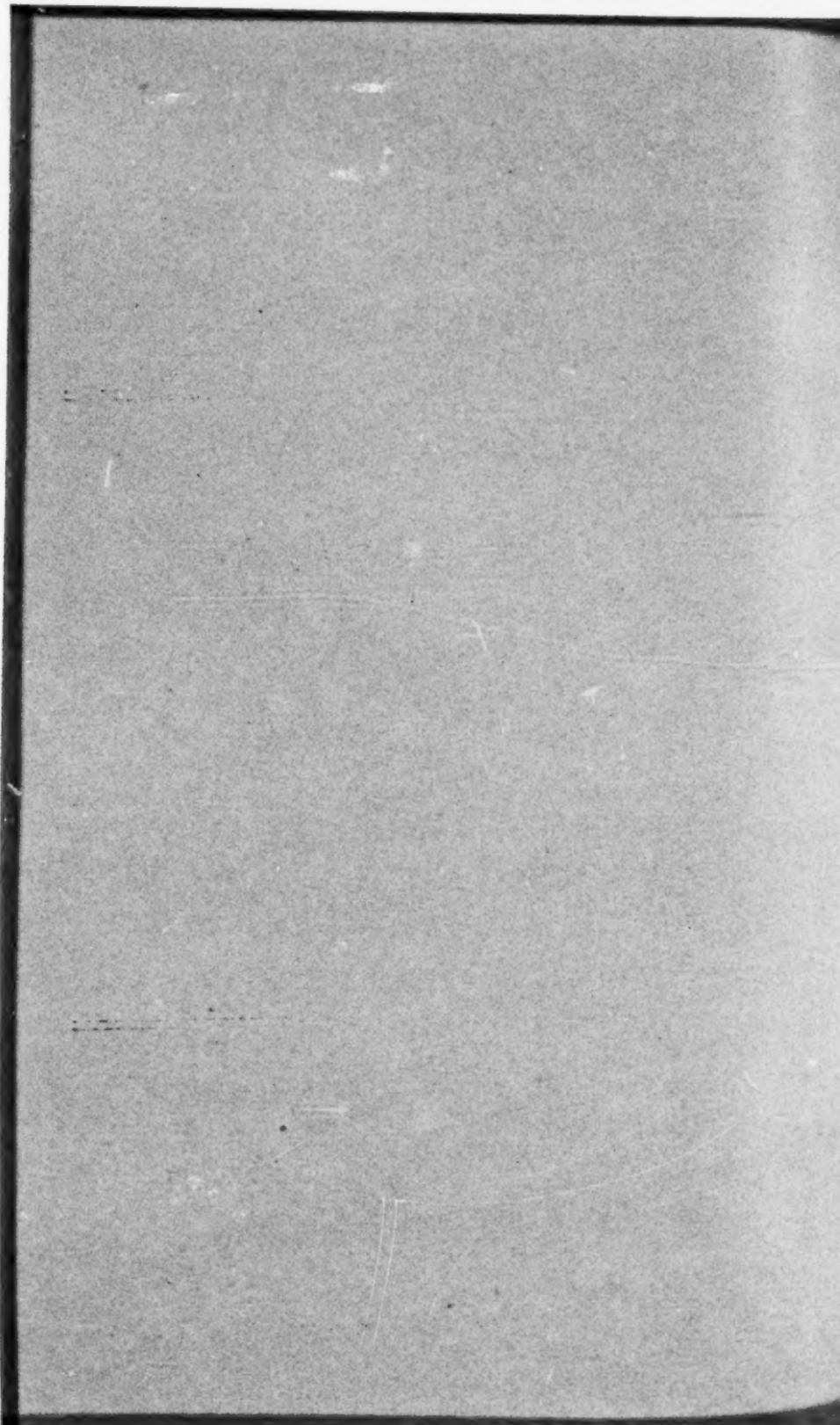
ABILENE & SOUTHERN RAILWAY COMPANY, THE
ATCHISON, TOPEKA & SANTA FE RAILWAY COM-
PANY, THE CHICAGO, ROCK ISLAND & PACIFIC RAIL-
WAY COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF KANSAS.

FILED JULY 25, 1923.

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(29766)



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COMMERCE COMMISSION, APPELLANTS,

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ABILENE & SOUTHERN RAILWAY COMPANY, THE
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PANY, THE CHICAGO, ROCK ISLAND & PACIFIC RAIL-
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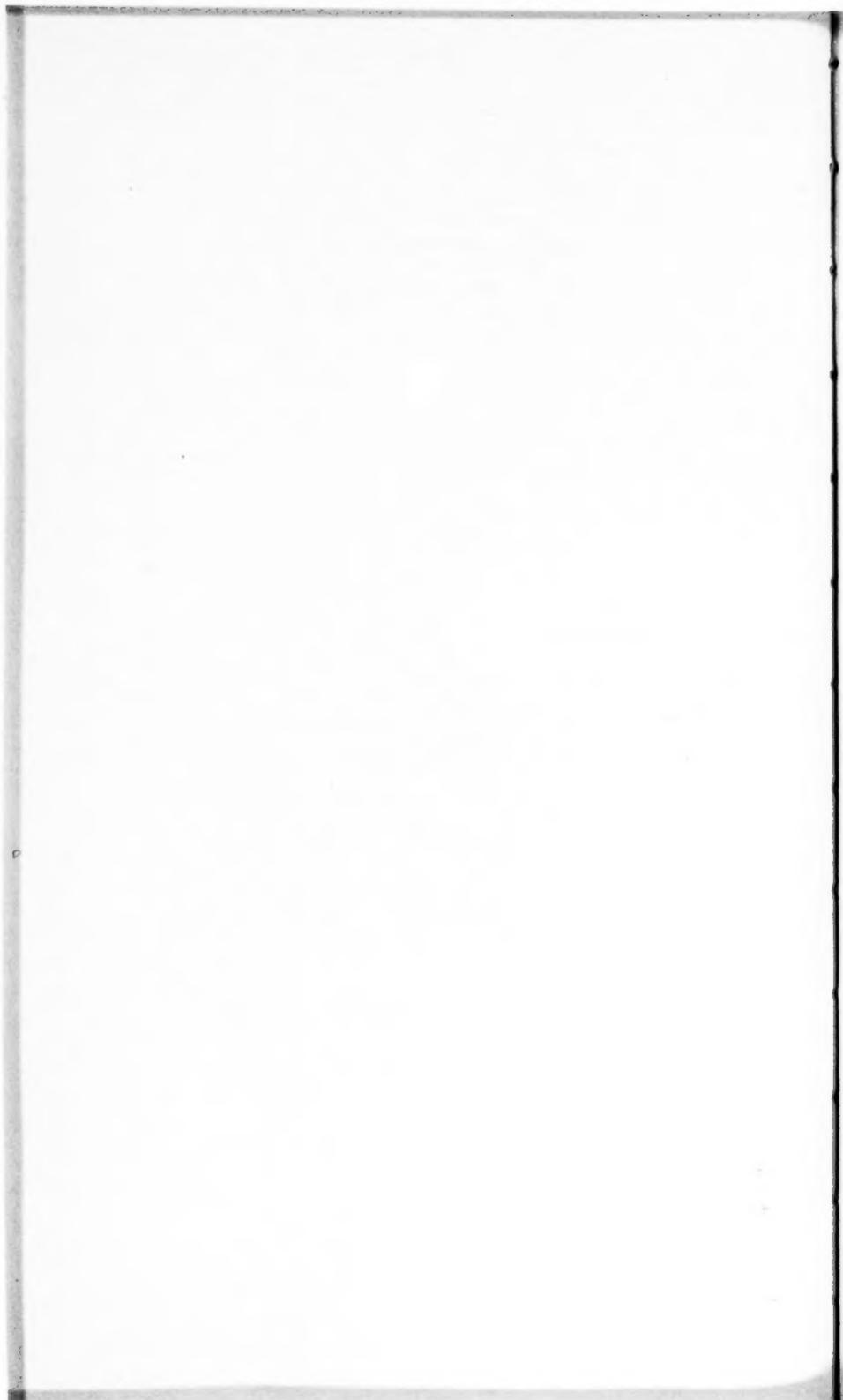
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1

Citation on appeal.

Filed May 31, 1923. [Omitted in printing.]

Service of a copy of the within citation is hereby admitted and acknowledged this 28th day of May, 1923.

T. J. NORTON,

M. G. ROBERTS,

Solicitors for Appellees.

[File endorsement omitted.]

2 In the District Court of the United States for the District of Kansas, Second Division.

ABILENE & SOUTHERN RAILWAY COMPANY; the Atchison, Topeka & Santa Fe Railway Company; the Chicago, Rock Island & Pacific Railway Company; the Clinton & Oklahoma Western Railroad Company; Ft. Worth & Denver City Railway Company; the Galveston, Harrisburg & San Antonio Railway Company; Gulf, Colorado & Santa Fe Railway Company; Midland Valley Railroad Company; Missouri, Kansas & Texas Railway Company of Texas (C. E. Schaff, receiver); Missouri Pacific Railroad Company; St. Louis-San Francisco Railway Company; the Texas & Pacific Railway Company (J. L. Lancaster and Charles L. Wallace, receivers); and the Wichita Falls & Northwestern Railway Company, plaintiffs,

v.

UNITED STATES OF AMERICA, DEFENDANT; Interstate Commerce Commission, intervening defendant; and the Kansas City, Mexico & Orient Railroad Company, William T. Kemper, receiver, and Kansas City, Mexico & Orient Railway Company of Texas, interveners.

In Equity. No. 278-N.

3 [Title omitted.]

Bill for injunction.

Filed Sept. 13, 1922.

Plaintiffs in the above-entitled cause, by corporate name herein-after designated, bring this their bill for injunction against the United States of America and for grounds of relief say:

FIRST.

Abilene & Southern Railway Company is a corporation organized under the laws of the State of Texas.

The Atchison, Topeka & Santa Fe Railway Company is a corporation organized under the laws of the State of Kansas.

The Chicago, Rock Island & Pacific Railway Company is a consolidated corporation organized under the laws of the States of Iowa and Illinois.

The Clinton & Oklahoma Western Railroad Company is a corporation organized under the laws of the State of Oklahoma.

Ft. Worth & Denver City Railway Company is a corporation organized under the laws of the State of Texas.

The Galveston, Harrisburg & San Antonio Railway Company is a corporation organized under the laws of the State of Texas.

Gulf, Colorado & Santa Fe Railway Company is a corporation organized under the laws of the State of Texas.

Midland Valley Railroad Company is a corporation organized under the laws of the State of Arkansas.

Missouri, Kansas & Texas Railway Company of Texas (C. E. Schaff, receiver) is a corporation organized under the laws of the State of Texas.

Missouri Pacific Railroad Company is a corporation organized under the laws of the State of Missouri.

St. Louis-San Francisco Railway Company is a corporation organized under the laws of the State of Missouri.

The Texas & Pacific Railway Company (J. L. Lancaster and Charles L. Wallace, receivers) is a corporation incorporated under act of Congress.

4 The Wichita Falls & Northwestern Railway Company is a corporation incorporated under the laws of Oklahoma.

All of said corporations are common carriers engaged in interstate commerce and each has direct physical connection with one or both of the applicants before the Interstate Commerce Commission as is hereinafter more fully shown.

Each of said plaintiff carriers above named is subject to the act to regulate commerce, commonly called the interstate commerce act, and all other carriers hereinafter referred to have been at all times herein mentioned subject to said act.

SECOND.

The jurisdiction of the court depends upon an act of Congress of October 22, 1913 (38 Stat. L. 219), providing for the institution of suits to suspend or set aside in whole or in part any order of the Interstate Commerce Commission, and upon the application of the Constitution of the United States.

The applicant, the Kansas City, Mexico & Orient Railroad Company (William T. Kemper, receiver), in whose favor the order herein complained of was made, is a corporation created and existing under the laws of the State of Kansas and has its residence and principal place of business at Wichita in the said State in the second division of the district thereof.

THIRD.

1. Plaintiffs allege that on April 3, 1922, upon consideration of an application filed on behalf of The Kansas City, Mexico & Orient Railroad Company (William T. Kemper, receiver) and the Kansas City, Mexico & Orient Railway Company of Texas, the Interstate Commerce Commission entered an order in proceeding No. 13668, entitled "In the Matter of Divisions of Joint Rates, Fares, and Charges on Traffic Interchanged between The Kansas City, Mexico & Orient Railroad Company (William T. Kemper, receiver) and the Kansas City, Mexico & Orient Railway Company of Texas and Their Connections," in which an order of investigation was instituted to inquire into said matter—

"And particularly to determine whether the divisions of joint rates, fares, and charges on traffic interchanged between said applicants and other carriers subject to the interstate commerce act are unjust, unreasonable, inequitable, or unduly preferential or prejudicial within the meaning of paragraph (6) of section 15 of said act."

2. Said order assigned the case for hearing at Washington 5 on May 15, 1922, before C. V. Burnside, an examiner of the said commission, and on the day appointed it was heard by said examiner. Thereafter, on August 9, 1922, the Interstate Commerce Commission entered the following order:

" ORDER.

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 9th day of August, A. D. 1922.

No. 13668.

IN THE MATTER OF DIVISIONS OF JOINT RATES, FARES, AND CHARGES ON TRAFFIC INTERCHANGED BETWEEN THE KANSAS CITY, MEXICO & ORIENT RAILROAD COMPANY AND THE KANSAS CITY, MEXICO & ORIENT RAILWAY COMPANY OF TEXAS AND THEIR CONNECTIONS.

A hearing and investigation of the matters involved in this proceeding having been had, and said divisions having, on the date

hereof, made and filed a report containing its findings of fact and conclusion thereon, which report is hereby referred to and made a part hereof:

It is ordered, That on and after September 15, 1922, the divisions of interstate joint rates received by Abilene & Southern Railway Company, The Atchison, Topeka & Santa Fe Railway Company, The Chicago, Rock Island & Pacific Railway Company, The Clinton & Oklahoma Western Railway Company, Fort Worth & Denver City Railway Company, The Galveston, Harrisburg & San Antonio Railway Company, Gulf, Colorado & Santa Fe Railway Company, Midland Valley Railroad Company, Missouri, Kansas & Texas Railway Company of Texas and C. E. Shaff, receiver, Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company, The Texas & Pacific Railway Company and J. L. Lancaster and Charles L. Wallace, receivers, and the Wichita Falls & Northwestern Railway Company, hereinafter termed the connecting lines, on freight traffic interchanged with the Kansas City, Mexico & Orient Railway Company and its receiver, and the Kansas City, Mexico & Orient Railway Company of Texas, and their successors, herein-after termed the Orient, shall not exceed the following percentages of the divisions accruing on such traffic to said connecting lines, respectively:

Abilene & Southern Railway Company-----	85 per cent.
The Atchison, Topeka & Santa Fe Railway Company-----	75 per cent.
The Chicago, Rock Island & Pacific Railway Company-----	80 per cent.
The Clinton & Oklahoma Western Railway Company-----	90 per cent.
Fort Worth & Denver City Railway Company-----	70 per cent.
The Galveston, Harrisburg & San Antonio Railway Company-----	75 per cent.
Gulf, Colorado & Santa Fe Railway Company-----	70 per cent.
Midland Valley Railroad Company-----	80 per cent.
Missouri Kansas & Texas Railway Company of Texas and C. E. Schaff, receiver-----	80 per cent.
Missouri Pacific Railroad Company-----	80 per cent.
St. Louis-San Francisco Railway Company-----	80 per cent.
The Texas & Pacific Railway Company and J. L. Lancaster and Charles L. Wallace, receivers-----	80 per cent.
The Wichita Falls & Northwestern Railway Company-----	75 per cent.

It is further ordered, That divisions of joint rates applicable to traffic as to which the Orient is an intermediate carrier shall be adjusted by the connecting lines on relative basis of proportions prescribed above.

It is further ordered, That the several amounts by which the divisions accruing to said connecting lines are reduced under this order shall on and after September 15, 1922, accrue to the said Orient, in addition to the divisions theretofore accruing to said Orient on such traffic.

It is further ordered, That the resulting divisions shall be reduced as far as practicable to two-figure percentages according to the rule prescribed in said report.

6 It is further ordered, That said connecting lines above named, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on and after September 15, 1922, and thereafter to abstain, from asking, demanding, collecting, or receiving divisions of said interstate joint rates with the Orient upon other bases than those above prescribed.

It is further ordered, That said connecting lines, respectively, and the Orient shall jointly report to this commission on or before September 15, 1922, the divisions established under this order, of each of said carriers with respect to freight traffic moving under interstate joint rates between each of the stations or groups of stations for which such divisions are determined; and shall thereafter jointly report the number of tons, ton-miles, and revenue with respect to such traffic actually interchanged for the period from September 15 to December 31, 1922, inclusive, and for the period from January 1 to June 30, 1923, inclusive; said reports for the period from September 15 to December 31, 1922, inclusive, shall be rendered on or before April 1, 1923, and the reports for the period from January 1 to June 30, 1923, inclusive, shall be rendered on or before October 1, 1923.

It is further ordered, That the word "division" as herein used, shall mean the total apportionment of a joint rate, whether determined by percentages, arbitraries, or otherwise.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the commission, divisor 4:

[SEAL.]

GEORGE B. McGINTY,

Secretary."

3. Said order was in pursuance of a report of the commission of the same date, which report is attached to this bill as Exhibit A and made a part hereof as fully as though it were set out herein.

4. Plaintiffs allege that the said order of the commission was made without evidence to support it and that the record was entirely bare of any testimony or other proof that the divisions at that time existing between the plaintiffs and the said applicants before the commission were in any way unfair or unreasonable or unduly preferential or prejudicial. Moreover, applicants failed to introduce any evidence to show what would be just, reasonable, and equitable divisions for the future; and therefore the order of the commission prescribing divisions for the future was without evidence to support it. In support of the foregoing allegation plaintiffs will tender at the hearing for the information of the court a copy of the entire record before the Interstate Commerce Commission certified by the secretary of the said commission.

Plaintiffs allege further that there is no evidence in the record upon which the commission could have based the conclusion
7 that one carrier should, without regard to service performed or distance hauled, give up to the applicants 15 per cent of

its revenue accruing under joint through rates while another carrier should give up 25 per cent, and another carrier 20 per cent, and another carrier 10 per cent, and another carrier 30 per cent; and they allege their belief to be that the commission fixed the percentages stated in said order solely upon its assumption that the respective plaintiffs were relatively able financially to bear those proportions of the burden of supporting applicants. Plaintiffs say that the additional burdens thus placed upon them by the order of the commission will aggregate more than \$500,000 a year, and that such divisions are in excess of what is just, reasonable, and equitable, and are unduly preferential of applicants and unduly prejudicial to each of these plaintiffs.

5. Plaintiffs allege that the report of the commission (Exhibit A attached hereto) shows that from 1912 to 1921, both inclusive, the railway applicants were unable to earn expenses in all but three years, the deficit in 1919 being \$1,246,579.11, and the deficit in 1920 running as high as \$1,470,106.97.

6. Plaintiffs allege that the said order of the commission was made arbitrarily and without evidence, for the purpose of giving, out of the revenues of plaintiffs here, financial aid to a railway system which was improvidently built and the construction of which would not be authorized to-day under section 1 (18) of the interstate commerce act, requiring a certificate that present or future public convenience and necessity require or will require the construction of the line.

7. Plaintiffs allege that the system of railways of the applicants, extending from Wichita, Kansas, in a southwesterly direction through Sweetwater, Texas, to Alpine, Texas, was badly conceived, in that it was constructed for a long distance parallel with already existing and strong lines of railway, in that it was constructed through regions not containing and not promising sufficient traffic to justify the construction of a line of railway, in that the line of railway was constructed in general across the main currents of traffic, and in that it is not now earning and never will be able to earn operating expenses.

8. Plaintiffs allege the Orient system as projected never was completed and that it remains stranded as a local line from Wichita southwest across the State of Texas almost to the Mexican boundary. Furthermore, its line from Wichita through Oklahoma closely parallels theretofore existing lines of railway.

9. Plaintiffs allege the fact to be, and that the record so shows, that the present system of applicant lines can not be rendered self-supporting without the addition of capital; and that as it was admitted of record before the commission that the capital can not be obtained, the action of the commission in attempting to support the applicant lines by unjust, unreasonable, and wholly arbitrary divisions was contrary to the evidence, was a misapplication of the law, and was a deprivation of property without due process of law and

a taking of property of plaintiffs for public use without just compensation, in violation of the fifth amendment to the Constitution of the United States.

8 10. Plaintiffs allege that the order of the commission is unlawful and arbitrary because it is directed against only the immediate connecting lines of applicants and that other connections participating in the revenue from joint through rates were not made parties to the proceeding. Such carriers are not subject to the order and will not therefore suffer any diminution of their revenues. Plaintiffs say that the commission is without jurisdiction to make an order respecting the divisions of joint through rates without the presence as parties of every carrier participating in the hauls thereunder, unless the order affect equally all carriers earning a part of the revenue so divided. Plaintiffs allege further that at the time of the hearing of this proceeding and now each of them participated and participates in joint through rates published and on file with the Interstate Commerce Commission and concurred in by other carriers, and under which a large volume of freight traffic moves and is interchanged between these plaintiffs and the said applicants, the divisions of which joint through rates as to these plaintiffs only were affected by the said order of the commission, because said participating carriers were not made parties to the proceeding, the result being that these plaintiffs are required and compelled by the said order of the commission to contribute and pay over to the said two applicants the respective percentages of their revenues earned on such shipments so moving as are hereinbefore set forth, although the other said lines, parties to the said through joint rates and handling such joint through shipments, are not required or compelled to contribute anything to said applicants or to share with these plaintiffs in the diminution of their revenues under the said order of the said commission.

11. Plaintiffs further allege that the said order of the commission will result in requiring competing lines to accept different earnings for substantially the same service and haul between the same points and will result in destroying uniformity of divisions on traffic interchanged by different connections of the applicants; that the said order is shown to be and is wholly arbitrary in this, that there is open for the movement of traffic, and freight traffic does move, between junction points of these plaintiffs, respectively, and the said two applicants and the great commercial centers of the country, such as Kansas City, St. Louis, and Chicago, and that under the said order of the commission shipments may move over the line or lines of these plaintiffs, or at least some of them, thereby producing the specified shrink in plaintiff's revenues, as is shown by said opinion and order of the commission, and yet at the same time such shipments may move over said lines not parties to said order with the result that these plaintiffs will receive far less revenue because of

said order than will be received by said other carriers not parties to said order for the transportation of freight between substantially the same points and hauled under substantially the same conditions.

9 12. Plaintiffs allege that sheet 6 and other parts of the report of the commission (Exhibit A hereto) were constructed by the commission from matter which was not submitted in evidence before the commission, which plaintiffs did not know was to be used, upon which they had no opportunity to cross-examine, and which matter was considered and treated by the commission, as shown by its report, as relevant and material.

13. Plaintiffs allege that in many if not all instances the division of the rate awarded to them by the commission would not yield them in revenue the cost of operation for the respective services rendered, not to mention a reasonable return on their investments; and they say further that few if any of them are earning the 5.75 per cent which the Interstate Commerce Commission found to be a reasonable return under the law in a case decided May 16, 1922, entitled Reduced Rates, 1922, No. 13293, 68 I. C. C. 676, page 734, involving all the carriers in the United States.

14. Plaintiffs allege that in the decision of this case the commission, as is manifest from the facts herein alleged and upon the face of the report and order of the commission, misconceived the meaning of and misapplied section 15 (6) of the interstate commerce act, and that such misapplication of said section will result in a denial to plaintiffs of the rights guaranteed to them by the fifth amendment of the Constitution of the United States.

15. Plaintiffs allege that the applicants before the Interstate Commerce Commission are wholly insolvent and unable to respond in damages or to make refunder of any of the divisions which would come into their possession should the said order of the Interstate Commerce Commission take effect, and later be judicially held to have been unlawfully entered. The said order of the Interstate Commerce Commission has been made to take effect on September 15, 1922, and unless it be suspended or set aside by an order of this court it will work irreparable damage to each and all of plaintiffs.

FOURTH.

Wherefore, plaintiffs pray that upon the filing and presentation of this bill a temporary stay or suspension of the operation of the order of the Interstate Commerce Commission be made by the court after a notice of three days to the Interstate Commerce Commission and the Attorney General of the United States, because of the irreparable damage which will result to the plaintiffs unless such suspension be made, and that the commission be restrained from taking any steps or instituting any proceedings to enforce the said order; that upon hearing of this cause a decree be entered setting aside and

annulling said order of the Interstate Commerce Commission and perpetually enjoining the enforcement of said order; and that the plaintiffs have such other and further relief as to the court may seem meet.

10 Plaintiffs further pray that in case it should be impossible to convene a three-judge court before September 15, an order be entered by the court under section 208 of the Judicial Code restraining and suspending the said order of the commission pending the final hearing and determination of this suit.

J. M. WAGSTAFF,
W. R. SMITH,
T. J. NORTON,
W. F. DICKINSON,
LUTHER BURNS,
ORVILLE BULLINGTON,
KENNETH F. BURGESS,
J. H. BARWISE, JR.,
FRED H. WOOD,
GARDINER LATHROP,
O. E. SWAN,

C. S. BURG,
W. W. BROWN,
C. C. HUFF,
H. H. LARIMORE,
W. P. WAGGENER,
W. F. EVANS,
M. G. ROBERTS,
R. R. VERMILION,
GEORGE THOMPSON,
J. M. BRYSON,

Solicitors for all Plaintiffs.

[Jurat showing the foregoing was duly sworn to by C. C. Dana omitted in printing.]

11 *Exhibit A to bill for injunction.*

Interstate Commerce Commission.

No. 13668.

Kansas City, Mexico & Orient Divisions.

IN THE MATTER OF DIVISIONS OF JOINT RATES, FARES, AND CHARGES ON TRAFFIC INTERCHANGED BETWEEN THE KANSAS CITY, MEXICO & ORIENT RAILROAD COMPANY AND THE KANSAS CITY, MEXICO & ORIENT RAILWAY COMPANY OF TEXAS AND THEIR CONNECTIONS.

Submitted May 16, 1922. Decided August 9, 1922.

Division of joint rates on traffic interchanged between the Kansas City, Mexico & Orient lines and their connections found to be unjust, unreasonable, and inequitable. Just, reasonable, and equitable divisions prescribed.

E. A. Boyd for Kansas City, Mexico & Orient Railroad Company and its receiver, and Kansas City, Mexico & Orient Railway Company of Texas.

Fred H. Wood and J. R. Bell for Galveston, Harrisburg & San Antonio Railway Company, Texas & New Orleans Railroad Company, Houston & Texas Central Railroad Company, Houston East

10 UNITED STATES ET AL. VS. ABILENE & SOUTHERN RY. CO. ET AL.

& West Texas Railway Company, Houston & Shreveport Railroad Company, Pacific Electric Railway Company, and Southern Pacific Company.

John H. Carroll and T. P. Littlepage for Fort Worth & Denver City Railway Company, Wichita Valley Railway Company, and Trinity & Brazos Valley Railway Company.

M. G. Roberts for St. Louis-San Francisco Railway Company.

C. S. Burg for receivers of Missouri, Kansas & Texas Railway Company, Missouri, Kansas & Texas Railway Company of Texas, and Wichita Falls & Northwestern Railway Company.

F. E. Andrews for Atchison, Topeka & Santa Fe Railway Company, Gulf, Colorado & Santa Fe Railway Company, and Panhandle & Santa Fe Railway Company.

H. G. Herbel for Missouri Pacific Railroad Company.

A. B. Enoch and T. P. Littlepage for Chicago, Rock Island & Pacific Railway Company and Chicago, Rock Island & Gulf Railway Company.

Robert Thompson for receivers of Texas & Pacific Railway Company.

12

Report of the Commission.

Division 4. Commissioners Meyer, Aitchison, Potter, and Cox.
By Division 4:

Upon the filing of a joint application by the receiver of the Kansas City, Mexico & Orient Railroad Company and by the Kansas City, Mexico & Orient Railway Company of Texas, hereinafter referred to together as the Orient, we instituted, by our order of April 3, 1922, an investigation into the divisions of joint rates, fares, and charges on traffic interchanged between those carriers and their connections. Forty carriers were named as respondents, comprising all of the principal lines serving the territory west and southwest of Chicago. The evidence was confined to the divisions of joint freight rates, and this report will be similarly limited.

The Orient alleges that its revenues are insufficient to enable it to pay operating expenses, taxes, and a fair return on the property held for and used in transportation service, or to enable it to perform properly its function as a common carrier, and contends that this condition can be remedied only by increasing its divisions of joint freight rates, or by increasing, through changes in routing, the amount of traffic it handles as an intermediate carrier. The request for changes in routing of traffic is before us in a separate proceeding.

The present line of the Orient in the United States extends from Wichita, Kans., to Alpine, Tex., a distance of 737 miles. The original plans called for construction of a line from Kansas City, Mo., to the Pacific coast at Topolobampo Bay, Mexico, with a

branch line from San Angelo to Del Rio, Tex. Construction in this country commenced at Anthony, Kans., in 1902, and the line from Wichita to Anthony was completed in 1913. The branch line has been graded from San Angelo to Sonora, Tex., and some grading has been done on the line from Wichita to Kansas City. Construction of the line in Mexico was commenced in 1901 and has been completed in parts. The line is in operation from Topolobampo Bay to Fuerte, from Sanchez to Minaca, and from Chihuahua to Marquez. Trackage rights have been secured over the Mexico Northwestern from Minaca to Chihuahua. Construction of the Mexican line was suspended in 1908 owing to revolutionary conditions in Mexico. That line, however, is not involved in this proceeding, which concerns only the mileage in the United States.

The principal connections of the Orient, as shown by its application, are as follows:

13 CONNECTING LINE.

Missouri Pacific.
Chicago, Rock Island & Pacific.
Atchison, Topeka & Santa Fe.
St. Louis-San Francisco.

Midland Valley.
Clinton & Oklahoma Western.
Wichita Falls & Northwestern.
Fort Worth & Denver City.
Missouri, Kansas & Texas of Texas.
Abilene & Southern.
Texac & Pacific.
Gulf, Colorado & Santa Fe.
Galveston, Harrisburg & San Antonio.

POINTS OF CONNECTION.

Wichita & Anthony, Kans.
Wichita and Anthony, Kans., and Clinton, Okla.
Wichita and Anthony, Kans.
Wichita, Kans., Clinton and Altus, Okla.
Wichita, Kans.
Clinton, Okla.
Altus, Okla.
Chillicothe, Tex.
Hamlin, Tex.
Hamlin, Tex.
Sweetwater, Tex.
Sweetwater and San Angelo, Tex.
Alpine, Tex.

The Kansas City, Mexico & Orient Railway Company was organized May 1, 1900. The corporation commenced operation of 75 miles of the line in Kansas and Oklahoma in 1903 and the mileage in operation was increased from year to year. The property passed into the hands of receivers on March 7, 1912. The Kansas City, Mexico & Orient Railroad Company was organized July 6, 1914, to purchase the property of the original company, which was sold under foreclosure. A receiver for the latter company was appointed on April 16, 1917, and the property is now being operated by him. The investment in road and equipment, less depreciation, as of December 31, 1921, is reported as \$21,969,730.31. The Kansas City, Mexico & Orient Railway Company of Texas was organized July 5, 1899, and construction was carried on concurrently with that of the lines in Kansas and Oklahoma. This company is not included in the receivership, but the receiver of the former company is also president of the latter. The investment in road and equipment of the Texas Company, less depreciation, as of December 31, 1921, is reported as \$6,878,360.62, the total for both companies being \$28,848,090.93.

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The following tabulation shows the railway operating income or deficit of the Orient system in the United States by years from 1912 to 1921, inclusive:

Year.	Income.	Deficit.
Year ended June 30, 1912.....		\$143,560.55
Year ended June 30, 1913.....	\$99,497.12	372,390.82
Year ended June 30, 1914.....	93,845.02
Year ended June 30, 1915.....	90,788.13
Year ended Dec. 31, 1917.....		45,446.07
Year ended Dec. 31, 1918.....		695,848.82
Year ended Dec. 31, 1919.....		1,246,579.11
Year ended Dec. 31, 1920.....		1,470,106.97
Year ended Dec. 31, 1921.....		860,740.81

The above figures include no charges on account of interest; taxes, however, are included.

14 In making its plea for increases in divisions and changes in routing of traffic, the Orient asks only a sufficient measure of relief to enable it to continue operation and makes no request for a return upon investment. The enormous increase in deficits commencing with the year 1918 is apparently due both to decreased revenues and largely increased expenses. It is claimed that the loss of revenue during the period of Federal control was largely due to changes in the routing of through traffic, and that since the termination of Federal control the former conditions have not been restored. The record indicates that a substantial proportion of the through traffic of the Orient was received from the Southern Pacific and that this carrier reduced its deliveries on account of alleged unsatisfactory service of the Orient. That the unfavorable operating results continue in the current year is indicated by the following statement of railway operating income for the first four months of 1922, taken from monthly reports on file with us:

January	\$105,289.00	deficit
February	59,432.00	deficit
March.....	59,346.00	deficit
April.....	116,539.00	deficit

Under the provisions of paragraph (6) of section 15 of the interstate commerce act the scope of our powers and duties in prescribing divisions of joint rates between carriers has been amplified. The statute provides that:

"In so prescribing and determining the divisions of joint rates, fares and charges, the commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or

circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

This provision has been considered by us heretofore. Pittsburgh & W. Va. Ry. Co. v. P. & L. E. R. R. Co., 61 I. C. C. 272; New England Divisions, 66 I. C. C 196; Divisions of Joint Rates and Fares of M. & N. A. R. R. Co., 68 I. C. C. 47.

IMPORTANCE TO THE PUBLIC OF THE TRANSPORTATION SERVICE.

The Orient extends in a general southwesterly direction from Wichita through Oklahoma into Texas, terminating at Alpine, where it connects with the Galveston, Harrisburg & San Antonio, a part of the Southern Pacific system. The principal products originating on the line are livestock, cotton and grain, and other products of agriculture. The road operates through 4 counties in Kansas, 8 in Oklahoma, and 16 in Texas, serving 13 county seats, of which 5 are served exclusively. It is estimated that an area of about 23,272 square miles, with a population of approximately 500,000, is served by this carrier, and the property value, exclusive of cities and towns, 15 is placed at \$204,250,000. Between Wichita and Altus, Okla., there are grain elevators at all stations, and in southern Oklahoma there are several cotton gins. A cement plaster mill at Hamlin, Texas, is served exclusively by the Orient. There are no mining or lumbering activities along the line, as a result of which the Orient is under the necessity of purchasing all of its coal and ties at points off its lines, resulting in increased expense on these items.

During the period 1917 to 1921, inclusive, traffic was handled by the Orient as follows:

Year.	Revenue freight originat- ing on road.	Revenue freight from con- necting carriers.	Total revenue carried, freight.
	Tons.	Tons.	Tons.
1917.....	356,593	831,128	1,187,721
1918.....	277,123	880,423	1,157,546
1919.....	335,143	917,492	1,312,635
1920.....	521,897	904,896	1,426,793
1921.....	471,324	910,430	1,381,754

The Orient is not primarily an originating carrier, but a large proportion of its freight tonnage is handled as an intermediate carrier. The figures for 1921, on basis of ton miles, are as follows:

	Ton-mile.
Originating on Orient.....	57,020,117
Delivered on Orient.....	39,331,668
Intermediate.....	89,058,723

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In our original report on the application of the Orient under section 210 of the transportation act, 1920, Finance Docket No. 3, we said:

"It is not disputed that the Orient system, or at least that part which lies within the United States, is of essential importance in meeting the transportation needs of the public in the territory which it serves."

Nothing appears of record in the present case to justify any different conclusion.

REVENUE REQUIRED TO PAY OPERATING EXPENSES, TAXES, AND A FAIR RETURN ON THE CARRIER PROPERTY.

The deficits in railway operating income for the years ended December 31, 1920, and 1921, have already been shown as \$1,407,106.97 and \$860,740.81, respectively. According to the estimate of the Orient, the deficit for 1922 will amount to \$1,590,213. For the year ended December 31, 1920, interest was accrued amounting to \$311,526.65, of which only \$17,622.95 was paid. For the year ended December 31, 1921, interest accruals amounted to \$514,665.32, of which \$150,000 was paid, this payment being applicable to a loan of

\$2,500,000 to the receiver of the Kansas City, Mexico & Orient Railroad Company under section 210 of the transportation act, 1920.

16 No allegation of inefficient operation appears in the record against the Orient or any of the respondent connecting lines. Various methods of increasing its revenues have been suggested. Application has been made to the Railroad Labor Board for authority to reduce wages and change rules which, if granted, will result in an estimated saving of about \$325,000. Increase in all rates is not considered feasible for the reason that it is believed that sufficient tonnage would be given to competing lines by the shippers to offset any increase in revenues from higher rates, and for the further reason that shippers on the Orient could not compete with shippers on other lines in the same territory. However, this matter has been and is receiving consideration.

Increasing the volume of traffic handled by the Orient would automatically increase its revenues and we believe this can be accomplished by designating its lines a "differential route" on certain commodities. For instance, a differential of 1 per cent per 100 pounds under the established rate on grain destined to Gulf ports should attract a considerable volume of tonnage to the Orient. This question should be made the subject of conferences between the Orient and its connections, and the necessary steps should be taken to accomplish this object. We are advised that five of the connecting lines are favorable to the adoption of a plan of differentials.

In *Divisions of Joint Rates and Fares of M. & N. A. R. R. Co., supra*, we said:

"The law in its present form requires that we give due consideration, among other things, to the revenue needs of carriers partici-

pating in joint rates to enable them to pay operating expenses, taxes, and a fair return on the value of their carrier property used in the transportation service as well as to all other facts or circumstances which, without regard to the mileage haul, entitle one carrier to a greater or less proportion of a joint rate than is received by others.

"In comparing the revenue needs of the Missouri & North Arkansas and its connections we have made use of various units derived in a uniform manner. For example, to secure unit comparisons embracing all revenues and all expenses we have adopted for use in some comparisons the 'equated ton-mile,' derived by adding to the freight ton-miles three times the passenger-miles, the ratio between freight revenue per ton-mile and passenger revenues per passenger-mile in that territory being approximately as one to three. We have also aggregated all transportation service car-miles. It is, of course, understood that the reduction of gross earnings or expenses to units of this character does not produce absolutely correct results, but where the same method is used in all cases, the results afford a reasonable basis for comparison."

The same general method of comparison has been followed in this case, as shown by the following statement:

COMPARISON OF UNIT REVENUES, AND RETURNS FOR YEAR ENDED DECEMBER 31, 1921.

	K. C. M. & O. and K. C. M. & O., Texas.	Abilene & South- ern Ry.	Atchison, Topeka & Santa Fe Ry.	Chicago, Rock Island & Pacific Ry.	Clinton, Okla. Western Ry.	Fort Worth & Denver City Ry.	Galves- ton, Harris- burg & San Antonio. Ry.	Gulf, Colorado & Santa Fe Ry.	Midland Valley R. R.	Missouri, Kansas & Texas Ry. of Texas.	Missouri Pacific R. R.	St. Louis- San Francisco Ry.	Texas & Pacific R. R.	Wichita Falls & North- western R. R.
Gross revenues:														
Per equivalent ton-mile, cents..	1,784	4,938	1,587	2,142	4,933	1,494	1,447	1,204	1,831	1,529	1,354	1,582	1,636	2,772
Per car-mile..... ^a	21.440	66.779	21.963	21.608	68.620	26.611	22.053	21.241	31.722	23.392	20.978	26.702	25.542	38.921
Per train-mile..... ^a	340.	472.	515.	413.	534.	603.	497.	531.	477.	441.	456.	443.	511.	460.
Operation expenses:														
Per equivalent ton-mile, cents..	1,991	3,429	1,097	1,157	4,060	1,090	1,264	1,925	1,398	1,225	1,131	1,163	1,402	1,846
Per car-mile..... ^a	23.933	46.373	15.179	17.574	56.482	17.637	19.267	15.539	24.216	18.742	17.521	19.631	21.623	25.911
Per train-mile..... ^a	379.	328.	356.	336.	400.	456.	434.	388.	364.	353.	381.	325.	432.	307.
Net revenues:														
Per equivalent ton-mile, cents..	207 ^b	1,509	490	265	873	504	183	433	304	225	419	254	297	
Per car-mile..... ^a	2,493 ^b	20,406	6,784	4,033	12,138	8,975	2,786	7,705	5,506	4,649	3,457	7,071	3,919	13,010
Per train-mile..... ^a	39.	144.	159.	77.	98.	203.	63.	143.	113.	88.	75.	118.	79.	154.
Net railway operating income:														
Per equivalent ton-mile, cents..	361 ^b	737	388	164	364	456	096	275	382	117	127	346	132	480
Per car-mile..... ^a	4,338 ^b	3,966	5,372	2,493	5,064	8,123	1,317	4,627	6,614	1,788	1,965	5,836	2,039	6,898
Per train-mile..... ^a	69. ^b	70.	126.	48.	41.	184.	30.	116.	98.	34.	43.	97.	41.	81.
Return per \$1,000,000 invest.:														
Gross revenue..... ^a dollars..	136.95	274.09	256.11	367.15	188.58	397.35	314.96	492.61	223.41	447.23	286.64	57.79	218.25	368.61
Ry. operat. income... ^a	15.92 ^b	85.76	79.11	68.53	33.36	134.01	39.79	132.31	52.86	88.90	47.73	43.49	123.21	
Ry. operat. income... ^a	27.70 ^b	40.90	62.65	42.39	13.92	121.29	18.81	107.31	46.58	34.19	27.13	47.70	22.63	65.05
Rate, per centum:														
Gross revenue..... ^a per cent..	13.70	27.41	25.61	36.72	18.86	39.74	31.50	49.26	22.34	44.72	28.96	21.83	28.34	36.86
Net revenue..... ^a per cent..	1.59 ^b	8.38	7.91	6.85	3.34	13.40	3.98	13.23	5.29	8.80	4.77	5.78	4.35	12.32
Ry. oper. inc. ^a	2.77 ^b	4.09	6.27	4.24	1.39	12.13	1.88	10.73	4.66	3.42	2.71	4.77	2.26	6.51

^b Denotes red figures.

The gross revenue of the Orient per equated ton-mile is greater than that of nine of its connections, and its earnings per car-mile are substantially smaller than eleven of the thirteen connections, while the earnings per train-mile are in each instance materially less, thus evidencing a smaller and less profitable train and car load, the usual incident of a light traffic. The operating expenses per equated ton-mile are greater than those of any connection except two small roads, namely: Abilene & Southern and the Clinton & Oklahoma Western, and its expenses per car-mile are substantially greater than those of the nine larger roads, while the expenses per train-mile are in six instances materially less. The general result is that while the Orient sustained a deficit in its net railway operating income of sixty-nine cents per train-mile, all of its connections received incomes ranging from thirty cents per train-mile in the case of the Galveston, Harrisburg & San Antonio to \$1.84 per train-mile in the case of the Fort Worth & Denver City.

In other calculations the results as distinguished between freight and passenger traffic have been separately considered based upon an allocation in accordance with our plan to include all operating revenue accounts. The operating ratios of the carriers concerned in respect of all revenue received show that the freight operating ratio is less than the passenger operating ratio with exception of the Atchison, Topeka & Santa Fe, Fort Worth & Denver City, St. Louis-San Francisco, and the Texas & Pacific, for which the freight ratio is higher. In the case of the Fort Worth & Denver City, Missouri, Kansas & Texas of Texas, and Midland Valley, the two ratios are substantially equal, which is also true of the combined result of the eleven major roads used in the calculations. It also appears that the freight ratio of the Orient (1.0791) is approximately 141 per cent of the average freight ratio of the other connecting lines 18 (0.7663) while the passenger ratio of 1.3518 is approximately 175 per cent of the average passenger ratio of (0.7718) the eleven major connections.

The disparity of 41 per cent in the case of freight service and 75 per cent in the case of passenger service would seem to indicate that the passenger fares and freight rates and divisions accorded this carrier are not sufficient to meet even the maintenance, traffic, transportation, and general expenses properly to be charged against either the freight or passenger traffic, to say nothing of taxes, equipment rental, and a fair return on the property investment used in the service. As stated above, however, the Orient is seeking only such revenue as will enable it to operate the road and is asking nothing for its security holders.

It is alleged that in many instances where divisions have been established by its connections on an arbitrary basis, these connections have declined to shrink their arbitrariness when the through rates have been reduced.

In Increased Rates, 1920, 58 I. C. C. 220, we authorized certain percentage increases in order to permit a return of 6 per cent on the

aggregate value of carrier property held for and used in the service of transportation within the boundaries of each rate-making group, under normal traffic conditions. In Reduced Rates, 1922, 68 I. C. C. 676, we found that 5 $\frac{1}{2}$ per cent on the aggregate value of such property would constitute a fair return after March 1, 1922. It is apparent, however, that the Orient has not received and is not receiving the share of the revenue within the group in which it is included to which it is properly entitled on basis of the amount and character of service performed.

CONCLUSION.

Other than filing statements containing information called for in our order, the respondents submitted no evidence at the hearing of this case.

Upon the facts of record, we find that the divisions of interstate joint freight rates on traffic interchanged between the Orient and its immediate connections are unjust, unreasonable, and inequitable, and that for the future in respect of traffic originating or terminating on the Orient just, reasonable, and equitable divisions of such joint rates accruing to each of the connecting lines should, on the average, not exceed the following percentages of such divisions:

Abilene & Southern	85 per cent.
Atchison, Topeka & Santa Fe	75 per cent.
Chicago, Rock Island & Pacific	80 per cent.
Clinton & Oklahoma Western	90 per cent.
Fort Worth & Denver City	70 per cent.
Galveston, Harrisburg & San Antonio	75 per cent.
Gulf, Colorado & Santa Fe	70 per cent.
Midland Valley	80 per cent.
Missouri, Kansas & Texas of Texas	80 per cent.
Missouri Pacific	80 per cent.
St. Louis-San Francisco	80 per cent.
Texas & Pacific	80 per cent.
Wichita Falls & Northwestern	75 per cent.

19 There are prescribed herein as the just, reasonable, and equitable divisions to be observed on and after September 15, 1922, divisions constructed substantially according to the following rules:

Considering separately the several divisions of interstate rates on freight interchanged between the Orient and its connections and having origin or destination on the Orient, there shall be deducted from the revenue or proportion accruing under divisions to said connections, whether determined upon arbitraries or percentages or in any other manner, the percentages hereinafter indicated of the totals of such revenue or proportions creditable to freight revenue, account No. 101, of such connections respectively: and the amounts so deducted from the revenues or proportions of its connections shall be added to the revenue or proportions of the Orient, to wit:

Abilene & Southern	15 per cent.
Atchison, Topeka & Santa Fe	25 per cent.
Chicago, Rock Island & Pacific	20 per cent.
Clinton & Oklahoma Western	10 per cent.
Fort Worth & Denver City	30 per cent.
Galveston, Harrisburg & San Antonio	25 per cent.

Gulf, Colorado & Santa Fe-----	30 per cent.
Midland Valley-----	20 per cent.
Missouri, Kansas & Texas of Texas-----	20 per cent.
Missouri Pacific-----	20 per cent.
St. Louis-San Francisco-----	20 per cent.
Texas & Pacific-----	20 per cent.
Wichita Falls & Northwestern-----	25 per cent.

Divisions of joint rates applicable to traffic as to which the Orient is an intermediate carrier will be adjusted by the immediate connections on relative basis of proportions prescribed above.

When the amounts of revenue accruing to the Orient and to its several connections out of the respective rates are thus determined, these revenues will in total be respectively represented so far as practicable by two-figure percentages; that is, expressed in respect of the proportion accruing to any line in full hundredth parts of the total to be divided and applied for the future so far as practicable to the total revenue accruing from freight rates between stations or groups of stations on the Orient and its immediate connections.

In cases where because of inconsistencies in present divisions, because the increased divisions accruing to the Orient may exceed local rates, or for other reasons, the divisions resulting from the above rules may in special instances be found to be inequitable, inconsistent, or otherwise unreasonable, the parties will be expected to make such adjustments as will effect substantially the general results prescribed and to report their action to us. Carriers for which rates of reduction of divisions are prescribed lower than are prescribed for their competitors on competitive business to or from the Orient may voluntarily meet the greater reduction in divisions prescribed for their competitors. If it shall be found that in special instances the divisions herein prescribed operate unjustly, inequitably, or otherwise unreasonably to the injury of any carrier participating in a joint rate with the Orient, such situations may be called to our attention by appropriate proceedings and we will afford such relief as we may find warranted.

The Orient and each of its connections respectively shall jointly report to us on or before September 15, 1922, the divisions established according to the foregoing rules, and shall thereafter jointly report the results of the application of these divisions to business actually interchanged in the year 1922, to December 31, and from January 1 to June 30, 1923, inclusive, with a showing of tons and of ton-miles and revenue for each carrier between stations or groups of stations as the case may be. The reports for the period ending December 31, 1922, shall be rendered on or before April 1, 1923, and the reports for the six months ending June 30, 1923, shall be rendered on or before October 1, 1923, and jurisdiction is retained to adjust on basis of such reports the divisions herein prescribed or stated if such adjustment shall to us seem proper.

At a conference of representatives of the States in which the Orient operates, and of connecting carriers, held since this case has been submitted, the official delegate from Texas stated that a large

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number of counties in his State had expressed their willingness to assess the Orient for taxation purposes at the nominal value of \$100 per mile. We believe that the other States should follow the lead of Texas in this respect; in fact, complete exemption from all taxes until the Orient can earn something is demanded in the public interest. We earnestly recommend this course to the respective State authorities.

It should also be stated that through the proper channels steps have been taken to route Government freight over the Orient as far as practicable.

An appropriate order will issue.

[File endorsement omitted.]

21 In United States District Court.

Motion of the United States to dismiss the bill of complaint.

Filed Sept. 30, 1922.

The United States of America, by its counsel, now comes and moves the court to dismiss the bill of complaint in the above-entitled cause for that the said bill of complaint is without equity on its face; and the bill of complaint and the exhibits attached thereto and made a part thereof do not state any cause of action against the defendant and the plaintiffs are not entitled to the relief prayed or any part of the same.

**BLACKBURN ESTERLINE,
Assistant to the Solicitor General.**

[File endorsement omitted.]

22 In United States District Court.

Motion to dismiss.

Filed Oct. 9, 1922.

Now comes the Interstate Commerce Commission, intervening defendant, which for convenience will be referred to hereinafter as the commission, and moves the court to dismiss the bill of complaint herein for want of equity, saying in support of its motion:

That the report in Kansas City, Mexico & Orient Divisions, No. 13668, which is attached to the bill as Exhibit A, and the order dated August 9, 1922, made in pursuance of said report, set forth in the "third" section, paragraph 2, of the bill, which said order the bill of complaint seeks to suspend, enjoin, and set aside, were made and entered by division 4 of the commission, as appears upon the face of the bill; that at the time said order and report were made and entered, division 4 of the commission was composed of four commissioners, as shown by said report; that the commission was then and

is now composed of eleven commissioners; that said order of division 4 of the commission is subject to reversal, change, or modification by the full commission upon rehearing by the full commission, and is subject to stay or suspension by the full commission pending such rehearing; that plaintiffs herein have a statutory right to make application for such rehearing by the full commission (section 16 (a) and section 17 (4) of the interstate commerce act); that the bill does not show that plaintiffs have applied for a rehearing of said cause by the full commission, or have applied to the full commission to stay or suspend said order of division 4 of the commission and, therefore, plaintiffs have not exhausted their remedies before the commission, the case has not reached a justiciable stage, and the bill is premature and should be dismissed.

23

IN UNITED STATES DISTRICT COURT.

Answer of Interstate Commerce Commission.

Filed Oct. 9, 1922.

The commission without waiving its objection to the sufficiency of the bill, stated in its motion to dismiss, and now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the bill contained, answers and says:

I.

Answering the "first" section of the bill, the commission admits that the allegations of fact contained therein are true.

II.

Answering the "second" section of the bill, the commission admits that the allegations of fact contained therein are true.

III.

1. Answering paragraph 1 of the "third" section of the bill, the commission admits that the allegations of fact contained therein are true.

2. Answering paragraph 2 of the "third" section of the bill, the commission admits that the allegations of fact contained therein are true, and the commission alleges that division 4 of the commission, by order entered on the 14th day of September, 1922, postponed until October 2, 1922, the effective date of its order of August 9, 1922.

3. Answering paragraph 3 of the "third" section of the bill, the commission admits that the allegations of fact contained therein are true.

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4. Answering paragraph 4 of the "third" section of the bill, the commission denies that the order therein referred to was
24 made without evidence to support it, and alleges that the record contained evidence which fully supports said order; denies that the record does not contain testimony or other proof that the divisions of joint rates, at that time existing between plaintiffs and applicants, were unfair or unreasonable or unduly preferential or prejudicial, and alleges that the record does contain such testimony and other proof; and denies that the record contains no evidence to show what would be just, reasonable, and equitable divisions of joint rates for the future and alleges that the record does contain such evidence.

Answering further, the commission denies that the conclusion in said report that applicants' divisions of joint rates with one connecting carrier should be increased by 15 per cent of the divisions then accruing to said connecting carrier, that applicants' divisions of joint rates with another connecting carrier should be increased by 25 per cent of the divisions then accruing to such connecting carrier, that applicants' divisions of joint rates with another connecting carrier should be increased by 20 per cent of the divisions then accruing to such connecting carrier, that applicants' divisions of joint rates with another connecting carrier should be increased by 10 per cent of the divisions then accruing to such connecting carrier, and that applicant's divisions of joint rates with another connecting carrier should be increased by 30 per cent of the divisions then accruing to such connecting carrier was made arbitrarily or without regard for the services performed or the distance hauled or without evidence to support it.

The commission denies that the percentage divisions in said order were fixed solely upon an assumption that the respective plaintiffs were able financially to bear those proportions of the burden of supporting applicants and alleges that in prescribing and determining said divisions, due consideration and weight were given, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their
25 respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and all other facts or circumstances which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, and to all other factors expressed or implied in the interstate commerce act.

The commission denies further that the divisions are in excess of what is just, reasonable, and equitable, or are unduly preferential of applicants, or either of them, or unduly prejudicial to plaintiffs, or any of them.

5. Answering paragraph 5 of the "third" section of the bill, the commission refers to the report mentioned therein, as showing the contents thereof.

6. Answering paragraph 6 of the "third" section, the commission denies that the order was made arbitrarily or without evidence for the purpose of giving financial aid to applicants out of revenues of the plaintiffs, and alleges that the purpose of the order was to fix just, reasonable, and equitable divisions of joint rates between the applicants and plaintiffs. As to whether the railway system of applicants was improvidently built or whether its construction would not be authorized to-day under section 1, paragraph (18), of the interstate commerce act, the commission is without knowledge or information sufficient to enable it to form a belief and therefore denies the same. In this connection the commission says that plaintiffs' allegations concerning these matters are purely conjectural and are not to be taken as allegations of fact.

7. Answering paragraph 7 of the "third" section of the bill, the commission admits that applicants were not at the time of the hearing earning operating expenses and denies all other allegations

of fact contained therein. In further answer, the commission alleges that the railway lines which serve the same territory served by a part of the railway line of applicants were for the most part constructed subsequent to the construction of the line of applicants and alleges further that the railway line of applicants for long distances serves important territory and the people living therein, not served by any other line of railway and entirely dependent upon applicants for railroad transportation.

8. Answering paragraph 8 of the "third" section of the bill, the commission admits that the Orient system, as projected, has not been completed; that the railway line of applicants now extends from Wichita, Kans., southwest to Alpine, Texas, near the Mexican border; denies all other allegations of fact contained therein and in this connection refers to its answer to paragraph 7 of the "third" section of the bill.

9. Answering paragraph 9 of the "third" section of the bill, the commission points out that the allegations contained therein are largely conclusions of law which require no answer. The commission denies the allegations of fact contained therein except that it admits and alleges that witnesses for applicants testified at the hearing that additional capital could not be obtained by applicants at that time.

10. Answering paragraph 10 of the "third" section of the bill, the commission denies that the order is unlawful or arbitrary because it is directed only against the immediate connecting lines of applicants, and denies all other allegations of fact contained therein except that the commission admits that carriers other than plaintiffs were, at the time of the hearing, parties to the joint rates here involved and admits that traffic moves on such joint rates. The commission refers to the order as itself showing its effect and purport.

11. Answering paragraph 11 of the "third" section of the bill, the commission refers to the order as itself showing its effect and purport, and in connection with the allegations in said paragraph "that the said order of the commission will result in requiring competing lines to accept different earnings for substantially the same service and haul between the same points and will result in destroying uniformity of divisions on traffic interchanged by different connections of applicants," the commission calls attention to the following language in the report, which is made a part of the order:

27 "Carriers for which rates of reduction of divisions are prescribed lower than are prescribed for their competitors on competitive business to or from the Orient may voluntarily meet the greater reduction in divisions prescribed for their competitors. If it shall be found that in special instances the divisions herein prescribed operate unjustly, inequitably, or otherwise unreasonably to the injury of any carrier participating in a joint rate with the Orient, such situations may be called to our attention by appropriate proceedings and we will afford such relief as we may find warranted."

The commission admits that traffic moves between junction points of applicants and plaintiffs and Kansas City, St. Louis, and Chicago, and that such traffic may move over the line or lines of these plaintiffs, or some of them, for the entire distance, or may move in part over the line or lines of one or more of plaintiffs, and in part over other lines not specified in the order. The commission alleges that the divisions of all carriers connecting immediately with applicants were reduced by said order. Answering further, the commission denies all other allegations of fact contained in said paragraphs.

12. Answering paragraph 12 of the "third" section of the bill, the commission denies the allegations of fact contained therein.

13. Answering paragraph 13 of the "third" section of the bill, the commission denies that the division of the rate awarded the plaintiffs will not, in every instance, yield them in revenue the cost of operation for the service rendered and a reasonable return on their investments. The commission alleges that it is immaterial in this case whether or not said plaintiffs, or any of them, are earning a 28 return of 5.75 per cent, and alleges in this connection that the applicants are failing to earn actual operating expenses.

14. Answering paragraph 14 of the "third" section of the bill, the commission denies that it misconceived the meaning of, or misapplied, section 15 (6) of the interstate commerce act, and denies that its order will result in a denial to plaintiffs of rights guaranteed to them by the fifth amendment of the Constitution of the United States.

15. Answering paragraph 15 of the "third" section of the bill, the commission alleges that it has no knowledge as to whether applicants would be unable to respond in damages, or to make refund of any or all of the revenue which would come into their possession

should the order take effect and later be judicially held to be unlawfully entered. In this connection, the commission alleges that if said order is suspended or set aside by an order of this court, applicants will be unable to continue the operation of their system of railraod and will suffer irreparable injuries as a result of such disability, and alleges further that applicants' line of railway serves a large territory and a great number of people served by no other railroad, and that the people and the territory dependent upon applicants' line or railway will suffer irreparable injury if its operation is discontinued.

IV.

Answering the bill further, the commission alleges that, in making said report and order, it considered and weighed carefully all of the evidence before it and gave due consideration and weight, among other things, to the factors which it is directed, either expressly or impliedly, to consider by the interstate commerce act; that it did not exceed the authority duly conferred upon it by law; and that the said report and order were not made without evidence to support them, or contrary to the evidence, and will not result

in taking property of plaintiffs' without due process of law,
29 or in taking their property for public use without just compensation.

The commission further alleges that plaintiffs have not applied to the full commission for a rehearing or asked the full commission to reverse, modify, change, or to stay or suspend said order of division 4 of the commission.

Except as herein expressly admitted, the commission denies the truth of each of and all the allegations contained in the bill.

All of which matters and things the commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION.
By J. CARTER FORT, *Its Solicitor.*

P. J. FARRELL,
Of Counsel.

[Jurat showing the foregoing was duly sworn to by B. H. Meyer.
Omitted in printing.]

[File endorsement omitted.]

Order of temporary injunction.

Filed October 9, 1922.

The application for injunction in this cause having been set down for hearing on September 16th last was, by agreement of counsel, continued to the 30th day of September, 1922, and coming on for

hearing before the undersigned judges at said time, it was ordered, after full consideration, that the motion of the Interstate Commerce Commission to dismiss said cause be and the same is now overruled. The plaintiffs appeared by T. J. Norton, Esquire, and M. G. Roberts, Esquire, their solicitors, the defendants by Blackburn Esterline, Esquire, and J. Carter Fort, Esquire, their solicitors, and the intervenors by E. A. Boyd, Esquire, their solicitor, and said application proceeded to hearing on said September 30th. Whereupon, counsel not having finished their argument, adjournment was taken until October 2nd, and hearing on said application continued.

On October 2, 1922, at the close of the hearing, it appearing to the court, from the full record of the proceedings before the commission on which its order now challenged was made, from affidavits in behalf of the plaintiffs submitted at the hearing, and from the arguments of counsel, that said order was made by said commission arbitrarily and unjustly, and without evidence submitted to it in support of same, and without consideration of its effect upon the rights of the plaintiffs in the subject matter, and without having heard or considered any testimony as to the effect of said order on the rights and interests of the plaintiffs, and that said order, if put into execution, will likely result in irreparable damages to the plaintiffs in the taking of their property without due or any process of law, it seemeth to the court that the immediate execution of said order so made by the Interstate Commerce Commission should be temporarily

stayed and enjoined until a full and final hearing in this cause.

31 Wherefore, it is ordered that the said order of the Interstate Commerce Commission so made as aforesaid, and the immediate execution thereof, be, and it is hereby, temporarily stayed, suspended, and enjoined until further order, or until final hearing. It is further ordered that the plaintiffs give bond in the penal sum of one hundred thousand dollars (\$100,000) to indemnify the defendants and the intervenors against any and all damages which they, or either of them, may suffer on account of this order of injunction.

It is further ordered that this cause be and the same is set down for final hearing at Denver on November 6th next.

It is further ordered that plaintiffs immediately cause a copy of this order, certified by the clerk, to be served on the defendants and the intervenors, or their respective counsel, and that they file proof of such service with the clerk.

This October 2nd, 1922.

ROBT. E. LEWIS,

Circuit Judge.

T. BLAKE KENNEDY,

District Judge.

J. FOSTER SYMES,

District Judge.

In United States District Court.

Answer of the United States.

Filed Nov. 27, 1922.

FIRST DEFENSE.

United States, for the first defense to the bill for injunction filed herein against it, says:

The bill with the exhibits attached thereto and made a part thereof is without equity on its face and does not state any cause of action against the United States and the court may not grant the relief prayed or any part of the same.

Wherefore the United States moves to dismiss the bill for want of equity.

SECOND DEFENSE.

United States, for the second defense to the bill filed herein against it, says:

That under title "third" of the bill it denies—

(a) The allegations contained in paragraph 4, and each and every part of the same, in manner and form as alleged;

(b) The allegations contained in paragraph 6 and each and every part of the same, in manner and form as alleged;

(c) The allegations contained in paragraph 7, and each and every part of the same, in manner and form as alleged;

(d) The allegations contained in paragraph 8, and each and every part of the same, in manner and form as alleged;

(e) The allegations contained in paragraph 9, and each and every part of the same, in manner and form as alleged;

(f) The allegations contained in paragraph 10, and each and every part of the same, in manner and form as alleged;

(g) The allegations contained in paragraph 11, and each and every part of the same, in manner and form as alleged;

(h) The allegations contained in paragraph 12 and each and every part of the same, in manner and form as alleged.

33 That under title "third" of the bill it denies the allegations contained in paragraphs 13, 14, and 15, and each and every part of the same, in manner and form as alleged. It alleges

that none of the plaintiffs herein, all of whom were and are parties to the order of the Interstate Commerce Commission, though given due notice and accorded a full hearing, and who appeared by counsel before the commission and examined and cross-examined the witnesses for the applicant, offered or pretended to offer any evidence in its or their behalf before the commission in opposition to that offered by applicant or otherwise, although the plaintiffs herein by their counsel were fully apprised of the contents of the record

of the evidence and proceedings then before the commission. On the contrary, the plaintiffs herein, by their counsel, openly before the commission deliberately declined to adduce any evidence whatever on their own behalf and in opposition to the evidence adduced in support of the application. It alleges that the plaintiffs herein are now estopped (1) from challenging the validity of the order on evidence other than that which was before the commission and upon which the latter rested its order, and (2) from seeking to destroy that order on evidence withheld from the commission and herein offered for the first time.

THIRD DEFENSE.

United States, for the third defense to the bill filed herein against it, says:

The matters and things alleged in the bill and exhibits attached thereto and sought to be put in issue were all before the Interstate Commerce Commission, were fully heard and determined by it, and were within its power and authority to hear and determine under the provisions of the act to regulate commerce and the transportation act of 1920. In its report in writing with respect thereto, made after full hearing and on due notice to all of the parties, which states its conclusion, together with its decision, order, or requirement in the premises, the matters and things of which complaint is made were fully considered and foreclosed by findings of fact based on substantial evidence.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

[Jurat showing the foregoing was duly sworn to by Blackburn Esterline. Omitted in printing.]

[File endorsement omitted.]

Statement of evidence on final hearing.

Be it remembered, that on the 27th day of November, A. D. 1922, the above-entitled cause came on for final hearing upon the application of the plaintiffs for injunction, before the Honorable Robert E. Lewis, circuit judge, and the Honorable T. Blake Kennedy and the Honorable J. Foster Symes, district judges, the plaintiffs appearing by T. J. Norton, M. G. Roberts, and Robert Thompson, Esquires, their solicitors, the United States of America by Blackburn Esterline, Esquire, its solicitor, the Interstate Commerce Commission by J. Carter Fort, Esquire, its solicitor, and the interveners by E. A. Boyd, Esquire, their solicitor.

Thereupon the following proceedings were had:

On behalf of plaintiffs, copy of the record before the Interstate Commerce Commission in the proceeding entitled "Kansas City, Mexico & Orient Divisions," No. 13668, certified by the secretary of

the commission, was offered in evidence. It was received and marked "Exhibit A." (Copy of said Exhibit A is attached hereto.)

36 C. C. DANA, a witness called and sworn on behalf of plaintiffs, testified as follows:

Direct examination:

I am assistant freight traffic manager of the Atchison, Topeka & Santa Fe, Chicago, Ill., and appear here in behalf of all of the plaintiff carriers in this proceeding.

At this point the witness was asked the following question:

Q. Have you made a study of the order of the Interstate Commerce Commission in this case to show what would be its financial effect upon the plaintiff carriers?

Mr. Esterline interposed the following objection:

Mr. ESTERLINE. Now, if Your Honors please, counsel for the Government objects to the witness testifying, and to the testimony of the witness, at the time the testimony was offered and before the same was received, upon the following grounds:

1. If it has any bearing on any issue or question in this case, the testimony should have been offered at the hearing before the Interstate Commerce Commission.

2. Plaintiffs may not withhold evidence from the Interstate Commerce Commission and, in the event of an adverse order, tender such evidence in the first instance to the court.

3. The alleged invalidity of the order of the Interstate Commerce Commission in this case may be raised and determined only on the record of the evidence and proceedings before the commission on which it based its order, and not on evidence taken before the court in the first instance.

4. The plaintiffs are seeking to invoke the jurisdiction of, and hearing by, the court as a substitute for the jurisdiction of, and hearing by, the Interstate Commerce Commission, as provided by the acts to regulate commerce, on a subject matter over which, in this case, the commission has exclusive jurisdiction.

5. The plaintiffs may not attend a hearing before the Interstate Commerce Commission, as provided by the statute, offer evidence of a certain nature and invite an order in their favor thereon, and then offer other evidence in another form to the court for the purpose of enjoining the adverse order of the commission.

6. The plaintiffs are seeking to deprive the Kansas City, Mexico & Orient Railroad Company of the hearing before the Interstate Commerce Commission provided by the act to regulate commerce and the transportation act of 1920.

7. The evidence offered by the plaintiffs has not been submitted to the Interstate Commerce Commission for its previous consideration and action.

8. The evidence now offered by the plaintiffs is incompetent, irrelevant, and immaterial, and otherwise inadmissible.

The counsel now asks the court to enter these objections, and each and all of the same, to the testimony of each witness after the witness is sworn, and to each question propounded to each witness, and to each answer made by each witness to each question so propounded, without the necessity of counsel having to repeat the objections, and each of them, to each question so propounded, and to each answer so made.

The court ruled upon said objections as follows:

By Judge LEWIS. We think we will hear the evidence subject to Mr. Esterline's objections, and subject to his motion to strike.

(Direct examination of Witness Dana resumed.)

Mr. Dana continued as follows: The matter with which I am dealing is exclusively that which was in the possession of the Interstate Commerce Commission in the trial below; and either appeared in the exhibits and evidence at the hearing before the commission in I. C. C. Docket 13668, or is contained in the table shown here and called sheet 6, which is shown in printed copy of the record at a page inserted between pages 404 and 405. There
38 is no matter here that has not been considered by the commission. I have a tabulation of what I intend to show to the court. I want to make this statement, that I am simply showing, in this exhibit, for all of the carriers, what Mr. Fort, in reply to the interrogation of the court, showed with respect to the A. T. & S. F. This exhibit (later received in evidence and marked "Exhibit B") consists of two pages. The first page is a statement of ton-miles and revenues under present divisions and as ordered in I. C. C. Docket No. 13668, accruing to the plaintiff carriers in this proceeding on freight traffic.

The present revenues, or the revenue, rather, of the Abilene & Southern Railway, on the basis of the traffic interchanged in 1921 under existing divisions, was \$13,326.75. Revenue to the Abilene & Southern under the order of the commission in I. C. C. Docket No. 13668 would be \$11,327.74. The revenue to the Abilene & Southern per ton-mile, or per ton per mile, rather, in cents, under the order, would be 3.733. The commission, in so-called sheet 6, between pages 404 and 405 of the printer record, show the operation expense per equated ton-mile, in cents, of the Abilene & Southern, to have been 3.429. For the A. T & S. F. Railway the revenue per ton-mile under the order would be, in cents, 1.449. The operation expenses as determined by the commission would be 1.097. The revenue per ton-mile for the C. R. I. & P. Railway under the order would be .868. That is to say, 8 mills and 68/100ths of a mill. The operation expenses as set up by the commission for the Rock Island were 1.157. The revenue per ton-mile for the Clinton, Oklahoma & Western Railway under the order would be 3.982. The operation expenses as shown by the commission were 4.060. The revenue per ton-mile for the Fort Worth & Denver City Railway under the order would be .933. Their operation expenses as shown by the order, or rather table of the commission, were .990. The revenue per ton-mile for the

39 Galveston, Harrisburg & San Antonio Railway under the order would be .947. Their operation expenses as fixed by the commission, or as determined by the commission, were 1.264. The revenue per ton-mile for the Gulf, Colorado & Santa Fe Railway under the order would be .631. Their operation expenses as determined by the commission were .925. The revenue per ton-mile for the Midland Valley under the order would be .894. Their operation expenses as determined by the commission were 1.398. The revenue per ton-mile for the Missouri, Kansas & Texas Railway of Texas under the order would be .909. Their operation expenses as determined by the commission were 1.225. The revenue per ton-mile for the Missouri Pacific Railroad under the order would be .911. Their operation expenses as determined by the commission were 1.131. The revenue per ton-mile for the St. Louis-San Francisco Railway under the order would be .714. Their operation expenses as determined by the commission were 1.163. The revenue per ton-mile for the Texas & Pacific Railroad under the order would be 1.262. Their operation expenses as determined by the commission were 1.402. The revenue per ton-mile for the Wichita Falls & Northwestern Railroad under the order would be 1.641. Their operation expenses as determined by the commission were 1.846.

The second sheet is simply a computation based upon the statements which were filed by the respondent carriers in the proceeding below under the order of the commission. The results are not exactly the same as those I have given, because the figures submitted by the respondent carriers in the proceedings below as to ton-mile revenue varied from those submitted by the Orient. Generally speaking, the result is exactly the same, or, rather, let me give this summary: On sheet one of the exhibit, eleven of the thirteen carriers are shown to suffer a loss under the order of the commission. On sheet two but ten are shown to suffer a loss. The figures submitted by the Clinton, Oklahoma & Western show that they would get a profit out of the business still, or something over and above operating expenses.

40 Cross-examination by Mr. FORT:

Q. You take these figures to show that, as to the eleven roads of which you spoke, these divisions will not meet the expenses?

A. I do, based upon the figures which the commission itself set up.

Q. I am asking you now—you are representing the Santa Fe as a traffic man—whether you meant to testify on the stand that those figures show, in your assumption, that those eleven roads will not receive the cost of their transportation?

Mr. NORTON. That is objected to, because they have been objecting all along to the introduction of new evidence. We don't want Mr. Dana to testify as to what he might think, individually, about this. He is dealing with the record before the commission.

By Judge LEWIS. Let him answer.

Mr. NORTON. Exception.

A. I think they do, Mr. Fort, as to the traffic interchanged with the Orient.

Q. You think they do?

A. Yes.

Q. And you base that thought, of course, upon the fact that the cost figures you show there are significant in showing the cost of moving that interchange business?

A. I think they are; yes.

Q. Do you show the Orient here?

A. No, sir; I just considered the plaintiff carriers in this proceeding; I have made no figures as to what the result for the Orient would be.

Redirect examination:

Exhibit prepared by the witness, heretofore referred to by him, consisting of two sheet, was offered in evidence on behalf of plaintiffs. It was received and marked "Plaintiffs' Exhibit B." (Copy attached hereto.) There was objection by Mr. Esterline, which was overruled.

(Witness excused.)

41 Mr. Norton, on behalf of plaintiffs, offered in evidence an exemplified copy of an order of the Texas commission, in which, he stated, that commission declined to grant to the Orient Railroad Company, on State rates, the divisions which were ordered in its behalf by the Interstate Commerce Commission on interstate rates. The paper was received in evidence marked "Plaintiffs' Exhibit C."

Thereupon plaintiffs rested their case.

Thereupon defendants and interveners rested.

[File endorsement omitted.]

457 In United States District Court.

Stipulation as to printed copy of Exhibit "A."

Filed July 12, 1923.

In the above-entitled case it is stipulated that the printed copy of the record before the Interstate Commerce Commission, as corrected with pen and ink, which has been furnished to the clerk of the court by counsel for the United States and for the Interstate Commerce Commission, is a true and correct copy of Exhibit A, introduced in evidence by petitioners at the final hearing in this case, and may be so certified by the clerk of the court and used in the transcript on appeal.

BLACKBURN ESTERLINE,

By J. CARTER FORT,

Attorney for the United States.

J. CARTER FORT,

Attorney for the Interstate Commerce Commission.

T. J. NORTON,

Attorney for Plaintiffs.

[File endorsement omitted.]

Plaintiff's Exhibit "B."—Filed Mar. 19, 1923.

Statement of ton-miles and revenues (under present divisions and as ordered in I. C. C. Docket No. 13668) accruing to the plaintiff carriers in this proceeding on freight traffic interchanged with the Orient system during the year 1921, as shown by Exhibits Nos. 25 and 26 of the Orient filed at the hearing; also comparison of plaintiff carriers' revenue per ton-mile under the order with the "Operation expense per equated ton-mile" as shown in sheet #6 of the order.

Plaintiff carriers.	Total ton-miles.	Total revenue under present divisions.	Total revenue under order I. C. C. Dkt. 13668.	Revenue per ton per mile in cents.		Operation expenses per equated ton-mile in cents as shown in sheet #6 of order.
				Present divisions.	Docket #13668.	
A. & S. Ry.....	303,391	\$13,326.76	\$11,327.74	4.392	3.733 3.429	3.429
A. T. & S. F. Ry.....	5,793,098	111,938.12	83,953.50	1.932	1.449 1.097	1.097
C. R. I. & P. Ry.....	35,122,543	381,190.94	304,952.73	1.085	1.157 .368	1.157
C. O. & W. R. R.....	206,788	9,149.72	8,234.75	4.425	3.982 4.060	4.060
F. W. & D. C. Ry.....	30,429,619	405,605.33	283,923.73	1.332	.933 .990	.990
G. H. & S. A. Ry.....	27,309,860	344,736.12	258,552.09	1.262	.947 1.264	1.264
G. C. & S. F. Ry.....	39,091,360	352,150.65	246,505.46	.900	.631 .925	.925
M. V. R. R.....	744,190	8,313.16	6,650.53	1.117	.894 1.398	1.398
M. K. & T. Ry. of T.....	8,583,709	97,585.46	78,068.37	1.136	.909 1.225	1.225
Mo. Pac. R. R.....	50,814,232	578,946.48	463,156.86	1.139	.911 1.131	1.131
St. L.-S. F. Ry.....	44,935,038	401,340.33	321,072.26	.893	.714 1.163	1.163
T. & P. Ry.....	38,309,337	605,704.07	484,563.26	1.578	1.262 1.402	1.402
W. F. & N. W. Ry.....	2,606,871	59,017.38	44,263.04	2.188	1.641 1.846	1.846

559 *Statement of ton-miles and revenues (under present divisions and as ordered in I. C. C. Docket No. 13668) accruing to the plaintiff carriers in this proceeding on freight traffic interchanged with the Orient system during the year 1921, as shown by the statements filed at the hearing by the plaintiff carriers (respondents below); also comparison of plaintiff carriers' revenue per ton-mile under the order with the "Operation expenses per equated ton-mile" as shown in sheet #6 of the order.*

Plaintiff carriers.	Total ton-miles.	Total revenue under present divisions.	Total revenue under order I. C. C. Dkt. 13668.	Revenue per ton per mile in cents.		Operation expenses per equated ton-mile in cents as shown in sheet #6 of order.
				Present divisions.	Docket #13668.	
A. & S. Ry.....	197,928	\$11,866.08	\$10,086.17	5.995	5.096	3.429
A. T. & S. F. Ry.....	4,773,733	88,957.01	66,717.76	1.863	1.398	1.097
C. R. I. & P. Ry.....	37,879,536	399,852.82	312,682.26	1.031	.825	1.157
O. & W. R. R.....	154,862	8,652.18	7,786.96	5.587	5.018	4.060
T. & W. D. C. Ry.....	29,112,197	407,441.23	285,208.86	1.399	.979	.990
H. & S. A. Ry.....	27,055,266	332,622.72	249,467.04	1.229	.922	1.264
C. & S. F. Ry.....	34,426,297	315,154.40	220,608.08	.915	.641	.925
L. V. R. R.....	792,310	8,365.64	6,692.51	1.056	.845	1.398
L. K. & T. Ry. of T.....	8,583,336	96,986.20	77,588.96	1.130	.904	1.225
Mo. Pac. R. R.....	44,844,242	551,758.10	441,496.45	1.230	.984	1.131
St. L.-S. F. Ry.....	41,085,085	402,682.95	322,146.36	.906	.778	1.163
T. & P. Ry.....	37,317,700	575,459.00	460,367.00	1.542	1.234	1.402
W. F. & N. W. Ry.....	2,406,005	59,028.43	44,271.32	2.619	1.840	1.846

[File endorsement omitted.]

460 *Plaintiff's Exhibit "C."* Filed Mar. 19, 1923.

[Certified copy of order of Railroad Commission of Texas dismissing application of Orient Railroad for increased divisions.]

Railroad Commission of Texas.

Hearing No. 2168. "Divisions, increased, to K. C. M. & O. Ry. of Texas on Texas intrastate freight traffic."

AUSTIN, TEXAS, November 16, 1922.

The above numbered and entitled cause having been called for hearing by the commission at its November Term, 1922, in pursuance of notice duly given therein under Circular No. 5649, and the commission having heard the facts, statements, and arguments presented by the applicant in support of the application presented, and by the other respondent carriers in protest against the same, and the commission having now duly considered the same, is of opinion and so finds that this commission is not, under the law of this State, vested with the power or authority to consider the stressed financial condition of a railroad company as a factor in arriving at a just division to accrue to it of a joint freight rate; it is further of the opinion and so finds that the existing freight rates applicable to the movements of traffic between the Kansas City, Mexico & Orient Railway of Texas and its connections seem just and reasonable, and that the prayer of the petition herein should be not granted.

It is therefore hereby ordered by the Railroad Commission of Texas that this cause be and the same is hereby dismissed.

ALLISON MAYFIELD, *Chairman,*
EARLE B. MAYFIELD, *Commissioner.*

Attest:

E. R. McLEAN,
Secretary.

461 [Jurat showing the foregoing was duly sworn to by E. R. McLean. Omitted in printing.]
[File endorsement omitted.]

462 In United States District Court.

Stipulation as to record.

Filed June 21, 1923.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated June 18th, 1923.

T. J. NORTON,
M. G. ROBERTS,
For the Petitioners.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General, for the United States.
J. CARTER FORT,
For the Interstate Commerce Commission.

[File endorsement omitted.]

In United States District Court.

Stipulation for approval of statement of evidence.

Filed June 21, 1923.

In the above-entitled case it is stipulated that an order may be entered approving the statement of evidence prepared by the appellants and providing that the transcript on appeal shall contain the portions of the record stated in the praecipe filed by the appellants.

T. J. NORTON,

M. G. ROBERTS,

For the Petitioners.

BLACKBURN ESTERLINE,

Assistant to the Solicitor General, for the United States.

J. CARTER FORT,

For the Interstate Commerce Commission.

463

[File endorsement omitted.]

In United States District Court.

Order approving statement of evidence.

Filed June 21, 1923.

Upon the stipulation of the parties, it is

Ordered, That the statement of evidence prepared by the appellants be, and the same hereby is, approved and that the transcript on appeal shall contain the portion of the records stated in the praecipe filed by the appellants.

Dated June 18th, 1923.

ROBT. E. LEWIS,
Presiding Judge.

O. K.

T. J. NORTON.

M. G. ROBERTS.

[File endorsement omitted.]

464 In United States District Court.

Opinion.

Filed Mar. 19, 1923.

Before Lewis, Circuit Judge, and Kennedy and Symes, District Judges.

Lewis, Circuit Judge, delivered the opinion of the court:

This is a final hearing on petition and application of 13 plaintiff carriers for the writ of injunction permanently restraining the en-

forcement of an order of the Interstate Commerce Commission, made in August, 1922, in these terms:

"A hearing and investigation of the matters involved in this proceeding having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

"It is ordered, That on and after September 15, 1922, the divisions of interstate joint rates received by Abilene & Southern Railway Company, the Atchison, Topeka & Santa Fe Railway Company, the Chicago, Rock Island & Pacific Railway Company, the Clinton & Oklahoma Western Railway Company, Fort Worth & Denver City Railway Company, the Galveston, Harrisburg & San Antonio Railway Company, Gulf, Colorado & Santa Fe Railway Company, Midland Valley Railroad Company, Missouri, Kansas & Texas Railway Company of Texas, and C. E. Schaff, receiver, Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company, the Texas & Pacific Railway Company, and J. L. Lancaster and Charles L. Wallace, receivers, and the Wichita Falls & Northwestern Railway Company, hereinafter termed the connecting lines, on freight traffic interchanged with the Kansas City, Mexico & Orient Railroad Company and its receiver, and the Kansas City, Mexico & Orient Railway Company of Texas, and their successors, hereinafter termed the Orient, shall not exceed the following percentages of the divisions accruing on such traffic to said connecting lines, respectively:

Abilene & Southern Railway Company-----	85 per cent
The Atchison, Topeka & Santa Fe Railway Company-----	75 per cent
The Chicago, Rock Island & Pacific Railway Company-----	80 per cent
465 The Clinton & Oklahoma Western Railway Company-----	90 per cent
Fort Worth & Denver City Railway Company-----	70 per cent
The Galveston, Harrisburg & San Antonio Railway Company-----	75 per cent
Gulf, Colorado & Santa Fe Railway Company-----	70 per cent
Midland Valley Railroad Company-----	80 per cent
Missouri, Kansas & Texas Railway Company of Texas, and C. E. Schaff, receiver-----	80 per cent
Missouri Pacific Railroad Company-----	80 per cent
St. Louis-San Francisco Railway Company-----	80 per cent
The Texas & Pacific Railway Company, and J. L. Lancaster and Charles L. Wallace, receivers-----	80 per cent
The Wichita Falls & Northwestern Railway Company-----	75 per cent

"It is further ordered, That divisions of joint rates applicable to traffic as to which the Orient is an intermediate carrier shall be adjusted by the connecting lines on relative basis of proportions prescribed above.

"It is further ordered, That the several amounts by which the divisions accruing to said connecting lines are reduced under this order shall on and after September 15, 1922, accrue to the said Orient, in addition to the divisions theretofore accruing to said Orient on such traffic.

"It is further ordered, That the resulting divisions shall be reduced as far as practicable to two-figure percentages according to the rule prescribed in said report.

"It is further ordered, That said connecting lines above named, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on and after September 15, 1922, and thereafter to abstain, from asking, demanding, collecting, or receiving divisions of said interstate joint rates with the Orient upon other basis than those above prescribed.

"It is further ordered, That said connecting lines, respectively, and the Orient shall jointly report to this commission on or before September 15, 1922, the divisions established under this order, of each of said carriers with respect to freight traffic moving under interstate joint rates between each of the stations or groups of stations for which such divisions are determined; and shall thereafter jointly report the number of tons, ton-miles, and revenue with respect to such traffic actually interchanged for the period from September 15 to December 31, 1922, inclusive, and for the period from January 1 to June 30, 1923, inclusive; said reports for the period from September 15 to December 31, 1922, inclusive, shall be rendered on or before April 1, 1923, and the reports for the period from January 1 to June 30, 1923, inclusive, shall be rendered on or before October 1, 1923.

"It is further ordered, That the word 'division,' as herein used, shall mean the total apportionment of a joint rate, whether 466 determined by percentages, arbitraries, or otherwise.

"And it is further ordered, That this order shall continue in force until the further order of the commission."

The proceeding resulting in the order against the 13 carriers complaining here was on application of the Kansas City, Mexico & Orient Railway Company of Texas and the receiver of the Kansas City, Mexico & Orient Railroad Company, together called the Orient system, which owns and operates a continuous line of railroad 737 miles long extending from Wichita, Kansas, to Alpine, Texas. That application asked for relief from the commission as to routing of traffic over the Orient system consigned by or to the United States, and also traffic not routed by the shipper (with neither of which we are now concerned), and also, thirdly, "For investigation and appropriate order applicable to just, reasonable, and equitable division of joint and through rates, fares, and charges to enable applicant to pay operating expenses and taxes on its railway property held for and used in the service of transportation, under paragraph 6, section 15, interstate commerce act," as amended by the act of February 28, 1920 (41 Stat. 474). The application recited that the Orient could not longer render transportation service to the territory which it served, pay the interest and principal on its loan from the United States, and pay operating expenses and taxes on its property, unless it was given relief, and that it must cease operation if relief was not obtainable. It suggested for consideration as a method of relief an equalization of earnings between the weaker and stronger lines, and submitted with its application illustrated tables, Exhibits A to J, inclusive, of selected shipments that had been

routed over its line. The first table selected a car of sewing machines shipped from Cleveland, Ohio, to San Francisco, which passed over six different lines, including the Orient. The amounts received by each carrier under the existing divisions of the tariff were 467 noted. The method suggested was to deduct from the earnings of the stronger lines a per cent of their gross earnings per mile and apply it to the existing divisions of the weaker lines, thus changing the amount that would be received by each carrier, so that the initial carrier, the New York Central lines, instead of receiving \$141.73, would receive \$88.52, and the Orient, an intermediate carrier, instead of receiving \$159.73, would receive \$226.96. All of the other exhibits dealt with through shipments and were illustrated in the same way, and it was said in the application:

"Under such a plan the gross earnings per mile of each line in the United States would be adjusted annually. The burden of supporting the weaker lines would automatically shift to the lines at the time most able to bear it. The transportation systems would become self-sustaining and the rate burden upon the public lessened. * * * Basing the distribution of earnings upon existing divisions, a plan should be adopted which would prevent the stronger lines from retaining the earnings in excess of a 6 per cent return, and whereby such excess could be automatically applied to the aid of the weaker lines participating in the haul. The problem of the weaker lines would then be solved. * * * We look to the commission with a full assurance that the difficulties of the Orient system, and of all the other weak lines, which are necessary to the communities served, will be met and that a plan will be adopted which will constitute a permanent cure, and not simply a temporary relief" ;

and it was prayed that the commission make investigation and appropriate orders in aid of the Orient system "applicable to divisions of rates, fares, and charges in support of the weaker lines." Attention was called to the points or stations along the route of the Orient at which the roads of the 13 plaintiffs connected with the Orient.

An elaborate brief and argument accompanied the application, in which, in support of the third suggested method, it was said:

"The plan here suggested will enable the commission, which has the power, to order the distribution of that fund, as soon as collected from the paying public, to the immediate relief of the lines requiring aid, and in such a form as will not exhaust the credit nor add to the ultimate burden of the line receiving the aid. If the weaker line can only have access to this fund as a borrower, the evil day is only postponed. The interest and the principal must be repaid eventually out of earnings. Before this weaker line can borrow, it must

468 show that its line is a public necessity and that the money sought is necessary to enable it to perform its duty to the public; but it must repay out of money collected from the public the money so borrowed, with interest, in order to perform its duty to the public to whom it is a necessity. This is not arguing

in a circle. It is simply stating the vicious circle into which the weaker line is drawn by the borrowing process under the law. The commission alone is clothed with power to extricate the weaker lines from this vortex. That the public money may perform its immediate public function in creating adequate transportation facilities is the design of the plan which we are asking the commission to consider and adopt.

"It is inevitable that if the stronger lines are to be allowed to collect in the first instance earnings which will exceed the lawful return, there will accumulate in the hands of the commission a large sum, which will only be available to the weaker lines for loan purposes. The conditions upon which these loans can be lawfully made are such that the loan itself will constitute only temporary relief, and will ultimately be a burden upon the weaker lines, and will defeat the purpose of the law as to service to the public. We respectfully submit that it would be more equitable and just to all concerned and to the public to establish a method which would render the necessary assistance to the weaker lines in the first instance, without carrying with it the burdens of a loan. It would be eminently fair and just that the surplus earnings of the stronger lines be automatically diverted to the weaker lines to such an extent as to enable the payment of operating expenses and taxes without the necessity of the fund passing to the commission and then to be distributed under loans. * * * There can be no question as to the authority of the commission to render essential aid by appropriate orders as to divisions of rates, fares, and charges. It is this authority the exercise of which we are asking. With our request we are offering a workable plan which will accomplish the desired results. * * * The manifest purpose of the Congress, in the public interest, was to secure more liberal consideration for the weak roads than could be obtained by their unaided efforts. * * * We therefore urge the use of the present carrier divisions as the foundation upon which the commission will construct a plan which will meet the equities and necessities of the case. This superstructure could be changed from time to time, as found necessary, without destroying or disturbing the fundamental basis.
* * *

"In financing the operations of the weaker lines, the commission has two available methods:

"First. It may distribute the earnings in excess of the legal return to the weaker lines in the form of a loan.

"Second. It may require a division of rates, fares, and charges, under the plan which we prepare, which will automatically divert this surplus to the weaker lines."

So far it is clear that there was no suggestion of only a redivision of joint rates then existing between the Orient and the 13 plaintiff carriers whose roads physically connected with the Orient system; neither was there a claim that those divisions, or any of them, were

469 "unjust, unreasonable, inequitable, or unduly preferential or prejudicial" as between the carriers parties thereto. The application, the illustrative tables attached to it, and the brief and argument in support proposed no such method of assistance but a different one. The proposal was a redivision with all participating carriers on a plan which would require the stronger and more prosperous roads to sustain those that were weak and in failing financial condition, without regard to the amount or cost of services respectively rendered. It was said in the brief that the plan was preferable to the one adopted by Congress (sec. 15-a) for loans to weaker roads and that its result, if enforced, would eliminate all necessity, indeed possibility, for making such loans. The Orient's application was received by the commission in February, 1922, and on the third of April following it entered an order making 39 railroad companies, including the 13 plaintiff companies, respondents, assigned the proceeding for hearing before Examiner Burnside on May 15, 1922, and directed that all respondents be cited to appear. The commission by its order of that date instituted an investigation to determine whether or not the divisions of joint rates, fares, and charges on interchange traffic were unjust, unreasonable, inequitable, or unduly preferential or prejudicial within the meaning of the interstate commerce act, and if so, the just, reasonable, and equitable divisions thereof that should be received by the several carriers. It ordered that the applicants and each respondent should file with the commission on or before the date of hearing a statement showing the number of tons and ton-miles of freight transported on their respective lines moving under joint rates and interchanged, and the revenues respectively received therefor, for the year ended December 31, 1921. The order recites that it was made upon consideration of the Orient's application. It did not make any railway company whose lines are wholly east of the Mississippi River a respondent, though the lines of some of the 39 respondents extended into territory east of the river.

470 When the taking of testimony came on before Examiner Burnside he asked counsel for the Orient to present its evidence. Three witnesses were called—the Orient's general traffic manager, its chief clerk to the traffic department, and its chief clerk to the general auditor. Their testimony and exhibits introduced clearly show that the Orient system can not continue in operation unless it obtains assistance. Its property represents an invested capital of \$29,000,000. The greater part of its line traverses a territory sparsely settled and semiarid. For the greater part of the way it is in competition with other lines upon either side, not many miles distant. Its local traffic is necessarily light. Its outgoing tonnage is chiefly livestock, considerable cotton, some grain and a small amount in miscellaneous productions. Its revenues are not enough to take care of its operating expenses and taxes on the present tariff bases. Hence, there has been for several years a continuing deficit, averaging at the time of the taking of proof about \$75,000 a month.

It has defaulted in the payment of interest on a loan obtained from the United States, extended to it through the commission of \$2,500,000. Its failing condition as a self-sustaining carrier is conceded. The plan of relief which it proposed, and shown in its illustrated tables, was gone into extensively by its general traffic manager. He recommended it as an appropriate remedy in taking care of all weak lines. Its deficit for 1922 will exceed \$1,500,000. To make this up on interchange traffic its share in joint rates would require an increase of more than 60%. Owing to competition it was said to be impracticable to increase local rates. If the line remains with its termini at Wichita, Kansas, and Alpine, Texas—not continued through to Kansas City from Wichita and from Alpine through the Republic of Mexico to the Pacific coast, as originally projected—it was the opinion of the general traffic manager that it would be impossible to make it pay operating expenses. Practically all of the

testimony in the record was directed to show that the Orient
471 system can not be made self-sustaining under present rates and conditions. It was seeking relief, and it suggested a plan which it believed would relieve its necessities. It made the record. The plaintiffs, aside from furnishing the statements showing the number of tons and ton-miles of freight transported on their lines and interchanged with the Orient for 1921 and the revenues therefor accruing to the Orient and to the respective plaintiffs, introduced no evidence. At the close of the proof introduced by the Orient the matter was submitted on the record without argument. And thereafter on August 9, 1922, division 4 of the commission announced in writing its conclusions and entered the order set out above. It released all respondent carriers except the 13 named in its order, whose roads physically connect with that of the Orient system. It found that "the divisions of interstate joint freight rates on traffic interchanged between the Orient and its immediate connections are unjust, unreasonable, and inequitable, and that for the future in respect of traffic originating or terminating on the Orient just, reasonable, and equitable divisions of such joint rates accruing to each of the connecting lines should, on the average, not exceed the following percentages of such divisions:

Abilene & Southern	85 per cent.
Atchison, Topeka & Santa Fe	75 per cent.
Chicago, Rock Island & Pacific	80 per cent.
Clinton & Oklahoma Western	90 per cent.
Fort Worth & Denver City	70 per cent.
Galveston, Harrisburg & San Antonio	75 per cent.
Gulf, Colorado & Santa Fe	70 per cent.
Midland Valley	80 per cent.
Missouri, Kansas & Texas of Texas	80 per cent.
Missouri Pacific	80 per cent.
St. Louis-San Francisco	80 per cent.
Texas & Pacific	80 per cent.
Wichita Falls & Northwestern	75 per cent.

"There are prescribed herein as the just, reasonable, and equitable divisions to be observed on and after September 15, 1922, divisions constructed substantially according to the following rules:

"Considering separately the several divisions of interstate rates on freight interchanged between the Orient and its connections and having origin or destination on the Orient, there shall be deducted from the revenue or proportion accruing under divisions to 472 said connections, whether determined upon arbitraries or percentages or in any other manner, the percentages hereinafter indicated of the totals of such revenue or proportions creditable to freight revenue, account No. 101, of such connections respectively; and the amounts so deducted from the revenues or proportions of its connections shall be added to the revenue or proportions of the Orient to wit:

Abilene & Southern-----	15 per cent.
Atchison, Topeka & Santa Fe-----	25 per cent.
Chicago, Rock Island & Pacific-----	20 per cent.
Clinton & Oklahoma Western-----	10 per cent.
Fort Worth & Denver City-----	30 per cent.
Galveston, Harrisburg & San Antonio-----	25 per cent.
Gulf, Colorado & Santa Fe-----	30 per cent.
Midland Valley-----	20 per cent.
Missouri, Kansas & Texas of Texas-----	20 per cent.
Missouri Pacific-----	20 per cent.
St. Louis-San Francisco-----	20 per cent.
Texas & Pacific-----	20 per cent.
Wichita Falls & Northwestern-----	25 per cent.

"Divisions of joint rates applicable to traffic as to which the Orient is an intermediate carrier will be adjusted by the immediate connections on relative basis of proportions prescribed above"; and its order followed.

There is no evidence in the record as to what the divisions of tariffs between the plaintiffs, or any of them, and the Orient were, unless those facts, necessary as a basis to support the commission's order, can be gleaned from the exhibits. There is no evidence in the record as to the amount and cost of service rendered by plaintiffs in the handling of interchange traffic, or any other proof tending to show that their proportions of divisions therefor were "unjust, unreasonable, inequitable, or unduly preferential or prejudicial" as between plaintiffs and the Orient, nor that the divisions prescribed by the commission in its order are "just, reasonable, and equitable" divisions as between them; unless those facts also can be adduced from some of the exhibits. Confessedly, from the arguments of counsel and their briefs, the issue comes down to the inquiry whether or not the necessary facts in support of the commission's order can be found in the exhibits; otherwise there is no proof on which the order can be rested. The necessities of a carrier, and the fact that it is being operated at a deficit, has been repeatedly held by the commission to not to be a sufficient ground on which to order an increase of divisions in favor of the failing carrier. The building of a line into nonsupporting territory, or into a field already adequately served, can not be justly debited to other carriers, and as between the latter the fact that some have immediate connections seems wholly negligible as a ground of distinction. Federal V. R. R. Co. v. Toledo & Ohio Ry. Co., 68 I. C. C. 499; Laona & L. R. Co.

v. Milwaukee S. P. & S. S. M. Ry. Co., 52 I. C. C. 7; McGowan-Foshee L. Co. v. Florida A. & G. R. Co., 51 I. C. C. 317. Participating carriers in a joint service are entitled to be compensated in proportion to the amount of service and the cost of the service which they each render, and the fact that one of them is prosperous and the other not will not override the just right of each to a fairly proportionate share out of the joint earnings, whether the amount distributed to each be fully compensatory or be less to each than the value of the services so rendered. Pittsburgh & W. Va. Ry. Co. v. Pittsburgh & Lake Erie Co., 61 I. C. C. 272; New England Divisions case, 66 I. C. C. 196. Paragraph 4 of section 1 of the act makes it the duty of participating carriers to establish and agree upon just, reasonable, and equitable divisions between them of the joint rates, so that none of them will be unduly preferred or prejudiced. The law presumes that this duty and obligation which it imposes has been complied with, that the divisions which the participating carriers have made among themselves is just and equitable to each, and the commission is without power under section 15 (6) to prescribe new divisions unless after full hearing it be of the opinion on the facts adduced that the existing divisions are "unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers"; and unless in the record presented there be some evidence to sustain such a conclusion its order abolishing old divisions and establishing new ones is without support and nonenforceable. I. C. C. v. L. & N. R. Co., 227 U. S. 88; I. C. C. v. U. P. R. Co., 222 U. S. 541; L. & N. R. Co. v. Finn, 235 U. S. 601; New York v. U. S., 257 U. S. 591, 600.

Taking up the exhibits (25 and 26, made up and offered by the Orient and corroborated by those which the commission required the plaintiffs to file), they show as to interchange traffic with the Orient, including intra- with inter- state shipments, both as to that delivered to and received from the 13 connecting carriers, the tons and ton-miles as to each plaintiff, the amount of revenue to each, including the Orient, and the rate per ton-mile for the carriage. Comparing the rate per ton-mile received by the Orient with that received by all of the 13 connecting carriers on all of their interchange business with the Orient for the year 1921, it appears that the rate to the Orient on that basis is slightly in excess of the average to all of the connecting carriers on the same basis: that is to say, the Orient received .0147¢ per ton-mile, which the average received by all of the 13 connecting carriers was .012¢. It received a higher ton-mile rate, both on traffic which it originated and also on traffic delivered to it by plaintiffs, than they received. Its ton-miles were less than the ton-miles of all of the plaintiffs in 1921 on the interchange traffic, and yet it received for its service \$635,000 more than the total received by plaintiffs. The rate per ton-mile is not regarded as determinative of the amount and cost of service, but we think the record shows no better guide on that

inquiry. We appreciate the fact that the ability of the commission to make proper deductions and conclusions from statistics embodied in these exhibits, with which it is their duty to constantly deal, is far greater than ours; but after prolonged study of these exhibits we have been unable to find in them any proof which in our judgment tends to show what the existing divisions were, or to support a conclusion that those divisions are unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the participating carriers. We are confirmed in our conclusion in that respect, because counsel for the commission does not argue that the exhibits alone show the divisions or that they are unjust and inequitable, but for that purpose contends that the exhibits coupled with data taken from the annual reports of the Orient and the 13 plaintiff carriers, which are set out in tabulated form in the commission's report, sustain the conclusion of fact and order. He concedes that the data so made up from the annual reports as in part the basis for the commission's conclusion could not be obtained from the testimony and exhibits in the case, but contends that the commission had a right to consider the annual reports filed with it by the carriers, for the purposes for which they were used in reaching its conclusion. The annual reports were not offered in evidence, and counsel for plaintiffs insist that for that reason the commission had no right to consider them. The proposition as to whether the annual reports could be considered arose early in the taking of the testimony. The examiner said:

"I have no doubt it will be necessary to refer to the annual reports of all these carriers. Will it be understood at the outset that those reports may be referred to?"

Counsel for plaintiffs replied:

"If anything from the annual reports is to be considered in the case it should be formally a part of the record by abstract or extraction therefrom."

Thereupon the examiner said:

"The rules of practice of the commission now effective, I think, provide that the annual reports may be used in evidence, and the requirement is that all matters which may be pertinent or which may be used in the case be reproduced and furnished in exhibits, but that would be quite a burden, and I feel constrained to proceed under the rule of the commission."

The rule of the commission which the examiner and counsel must have had in mind reads thus:

"(a) Where relevant and material matter offered in evidence by any party is embraced in a book, paper, or document containing other matter, not material or relevant, the party must plainly designate the matter so offered. If the other matter is in such volume as would unnecessarily cumber the record, such book, paper, or document will not be received in evidence but may be marked for identification and, if properly authenticated, the relevant and material matter may be read into the record, or, if the presiding commissione

or examiner so directs, a true copy of such matter, in proper form, shall be received as an exhibit, and like copies delivered by the party offering the same to opposing parties or their attorneys appearing at the hearing, who shall be afforded opportunity to examine the book, paper, or document, and to offer in evidence in like manner other portions thereof if found to be material and relevant. "(b)

In case any portion of a tariff, report, circular, or other document 476 on file with the commission is offered in evidence, the

party offering the same must give specific reference to the items or pages and lines thereof to be considered. The commission will take notice of items in tariffs and annual or other periodical reports of carriers properly on file with it or in annual, statistical, and other official reports of the commission. When it is desired to direct the commission's attention to such tariffs or reports upon hearing or in briefs or argument it must be done with the precision specified in the second preceding sentence. In case any testimony in proceedings other than the one on hearing is offered in evidence, a copy of such testimony must be presented as an exhibit. When exhibits of a documentary character are to be offered in evidence, copies must be furnished to opposing counsel";

and we are of opinion that the statement of the examiner was notice to the parties that the annual reports would not be considered unless the rule was complied with, and it was not complied with. It follows that the annual reports and the data which they contain were not made a part of the record, and were not properly before the commission for consideration in reaching its conclusions. But taking the data extracted by the commission from the annual reports and embodied in its opinion, their utilization was comparative—not self-probatative of the ultimate fact, but supposedly a means to ascertain that fact. They showed all business done by all participating carriers in 1921 as to revenues and expenses per equated ton-mile, car-mile, and train-mile in cents, the net revenues and net railway operating income in the same units, the gross and net revenue return in dollars per \$1,000 invested, and the railway operating income, from which the per centums in gross and net revenues and railway operating income of each carrier is calculated and put down, from which it appears that the Orient sustained a deficit in railway operating income of 2.77%, and the 13 plaintiff carriers a per centum profit as follows:

Fort Worth & Denver City Ry	12.13
Gulf, Colorado & Santa Fe Ry	10.73
Wichita Falls and Northwestern	6.31
Atchison, Topeka & Santa Fe	6.27
St. Louis-San Francisco	4.77
Wichita Valley	4.66
Chicago, Rock Island & Pacific	4.24
Abilene & Southern	4.09
Missouri, Kansas & Texas of Texas	3.42
Missouri Pacific	2.71
477 Texas & Pacific	2.26
Galveston, Harrisburg & San Antonio	1.88
Clinton, Oklahoma & Western	1.39

On the ton-mile unit the revenues of nine of the plaintiffs were less than that of the Orient, on the car-mile unit two of the plaintiffs received less revenue than the Orient, and on the train-mile unit the revenues of the Orient were substantially less than any of the plaintiffs. On the same units the operating expenses per equated ton-mile of two of the plaintiffs were greater, on the car-mile four were greater, and on the train-mile six were greater than the Orient. The Orient sustained a net loss under all three units of measure applied, while all of the 13 plaintiffs show a profit under each measure. The annual reports from which the commission obtained and used its data as proof covered all of the business of the 13 plaintiffs, both freight and passenger, the lines of some of them extending through many States—one from Chicago to California, and others serving territory equal in extent—and we are unable to understand how the deductions made by the commission from the annual reports may be considered to any extent as a helpful guide in determining whether the divisions of freight rates on traffic interchanged with the Orient were unfair or inequitable, or as contributive facts in determining just and equitable divisions between them. We think they added nothing to the facts in the record for the solution of the issue before the commission under section 15 (6) of the act. It seems to us that the inquiry was not directed to an ascertainment of the relative amount and cost of service on interchange traffic as between the Orient and the plaintiffs, and that there is no proof, including the annual reports, which will sustain a conclusion that existing divisions were unjust and inequitable at the time the order was made. The order is said to be of the blanket type. It cut through all existing divisions

alike and took from each carrier a uniform per cent and added 478 it to the Orient's share under the old divisions. A comparison

of those per cents with the per centums of railway operating income discloses that the greater the income of plaintiffs the greater the increase allowed the Orient by deductions from the more prosperous roads. This was the method of relief proposed by the Orient in its application.

The transportation act discloses no intention to vest the commission with power to relieve the necessities of weaker lines by imposing the burden upon its connections, simply because they are able to bear it. It exhibits a contrary purpose in section 15-a, because that policy would tend to bring all carriers to the same level in earnings and there would be no necessity for loans and no fund probably could be recovered for making them.

Much stress is placed on the literal expression found in paragraph 6, section 15, as to what the commission shall consider "in so prescribing and determining the divisions of joint rates, fares, and charges." Efficiency is an element in the cost of service, though not, we believe, to the extent of giving a reward to inefficiency; revenue required to pay operating expenses, taxes, and a fair return is of weight in determining whether an increase in the joint rate should be allowed, and if so, whether all or what part of the increase should

be given to a particular carrier, or whether there should be a decrease, and how borne; likewise, the importance to the public served, as to what the joint rate should be. But paragraph 6 is not isolated. Other parts of section 15 give the commission power to fix joint rates. Its whole power over the subject is in contemplation in paragraph 6. There is thus a mingling in that paragraph of subject matters to be considered by the commission on the different inquiries, some of weight in determining what the joint rates should be, in which both the public and all participating carriers are interested, and others in which the public has no concern. It is not interested as to which participant be the originating, intermediate, or delivering carrier, nor the mileage haul of each, nor how existing divisions should be divided between them, except remotely. No one but participating carriers are interested in a redivision of existing rates. So that it seems obvious to us that the phrase in paragraph 6 so much relied upon intends that all of the subjects named for consideration have application only where the inquiry goes to the extent of both fixing and dividing the joint rates; and that where it extends only to a division of existing rates, some of the things named for consideration by the commission have no relevancy to or weight in determining what the new divisions shall be. In such an investigation we think the controlling inquiry must necessarily be directed to ascertaining the amount and cost of service to each of them. It is not shown that the Orient maintains switching and terminal facilities for joint use, or is otherwise specially burdened at points of exchange, or that it is put to unusual expense in the joint service. It does show it makes empty hauls; but that, we take it, is true of all roads, especially when there is heavy movement to market. It is said that none of the territory along its line produces coal and lumber, and that it must receive those commodities, which it is required to use, from its connections at a charge for their service; but, so far as the proof discloses, that may be true also of some or all of the plaintiffs. In short, we find no facts in the record which sustain the order, except the broad proposition, amply supported by proof, that the Orient is not self-sustaining and needs help; but we can not assent that the commission is empowered to compel

480 prosperous roads, because they are prosperous, to contribute their services to the sustenance of weak roads, because they are weak. The character of the inquiry and the character of the order force us to the conclusion that that was what the commission intended to do and did do.

Neither side claims that the New England Divisions case (66 I. C. C. 196, 282 Fed. 306) is controlling or even helpful here. It was said by the court in 282 Fed. 313: "The question before the commission was the apportionment of the joint fund in proportion to the services rendered." The divisions there under consideration had stood for thirty years, the relations of the carriers to the joint service and the advantages and burdens imposed on each had greatly changed, the grounds on which the New England roads asked relief

were definitely set out, wherein the changed conditions to their relative disadvantage is made to appear, and the District Court said the evidence sustained the claim. On appeal of that case the Supreme Court said (opinion filed Feb. 19) : "An order, regular on its face, may, of course, be set aside if made to accomplish a purpose not authorized. * * * It is not true, as argued, that the order compels the strong railroads to support the weak," and that the increase given to the New England lines on the new division was all paid out of the rate increase ordered in *Ex parte* 74; and in a footnote: "Papers on the commission's files are not a part of the record in a case, unless they are introduced as evidence."

Both respondents have filed motions to dismiss, and it is claimed that they should be sustained because this proceeding was prematurely brought. It is argued that inasmuch as section 16-a of the act gave the plaintiffs the right to apply to the commission for a rehearing, that remedy should have been exhausted before this suit could be instituted. The application for a rehearing does not operate to stay the execution of the commission's order. The act

481 provides that it be not stayed on such an application unless the commission by special order grants a stay. Nothing could have been done by plaintiffs pending application for rehearing that would have stayed the execution of the order as a matter of right. We think plaintiffs were entitled to take the order as final for the purpose of this proceeding. See *Chicago Ry. Co. v. Illinois Commerce Co.*, 277 Fed. 970.

It is our opinion that the motions should be denied and that plaintiffs are entitled to an order and writ as prayed.

In United States District Court.

Dissenting opinion.

Filed March 19, 1923.

Kennedy, District Judge, dissenting:

It is with regret that I find myself unable to accede to the views of the majority in the disposition of this case, although I have joined with the other judges in signing the order carrying into effect their decision so that there may be no question as to its validity. I have been accorded the privilege of expressing my views as to the manner in which the case should be disposed of and herein express in a general way the reasons for my conclusion.

482 This is a proceeding involving the application of thirteen plaintiff carriers for a permanent writ of injunction restraining the enforcement of an order of the Interstate Commerce Commission made August 9, 1922, providing for an increased division of joint rates to the Kansas City, Mexico & Orient Railroad as against the plaintiff carriers.

After analyzing the case of the plaintiffs in the light of the points of attack carried in the arguments and briefs of counsel, I am con-

strained to eliminate from consideration as not having sufficient weight or bearing upon the controversy to entitle plaintiffs to relief the following:

a. It seems to me that there could be no question of confiscation generally where the commission has made a division of joint rates. Such a division would not prohibit the carriers affected in establishing a new joint rate which would bring to them a greater amount of money for the service rendered. If the commission should refuse to recognize such increased rate it might form the basis of an action in the courts that the established joint rate was confiscatory. In other words, until relief is denied by the commission itself, which is not the situation in this case, the question of a rate being confiscatory could not be raised.

b. I am not in accord with the views of the plaintiffs that the order of the commission is invalid because of failure to join other carriers who participated in the joint rates affected by the order, for the reason that the connecting carriers will simply be required to distribute the burden cast upon them among other connecting carriers, and so on among all carriers between or among which there is a joint rate established embracing the Orient Railway. It is the same as though these railroads had not yet but were now called upon to first establish joint rates as among all carriers.

483 c. As to the questions decided by the commission as reflected in the order attacked, not being within the issues raised by the pleadings before the commission, I do not consider that the objection is well founded. As long as the transportation act gives the commission the right to make investigations upon its own initiative as well as upon the complaint of one road as against another, coupled with the fact that in the first instance the Orient, with little attempt at formality of pleading or statement of ground for relief, simply ask the commission to investigate the question of joint rates and the commission thereupon proceeded to make such investigation, that we can not well take the narrow view that the commission did not have full power and authority upon the hearing to go into every phase of joint rates in which the Orient was interested.

d. As to the point that the commission arrived at its conclusions upon statistical data and information not introduced in evidence, I am inclined to believe that this is fully covered by the admitted procedure before the commission that it is a quasi-judicial body and not to be governed by the strict rules of evidence. The notice by the commission to these carriers that it was investigating joint rates with the Orient was sufficient to bring to their attention that all matters incident to the changing of those rates was before the commission. The chief criticism is that the commission considered the annual reports of the carriers themselves in arriving at their conclusions. These reports are filed with the commission, and so far as the carrier is concerned are authentic and binding upon it. The carrier was fully cognizant of the contents of the report and

could not very well be heard to deny the truth of its contents. It is an admission of against interest. In an investigation of this
484 character instituted by the commission upon the suggestion of a carrier concerned in joint rates, I consider it to be incumbent upon each carrier summoned to give the commission a full, fair, and frank statement and proof of how any diminution in joint rates then under consideration would affect it. This the plaintiffs in this case did not consider it to be their duty to do, as they offered no evidence. The very establishment of the commission itself carries the conclusion that it was the idea of Congress to establish a flexible tribunal consisting of experts to pass upon those questions which manifestly could not be effectively handled by the courts. A kindred thought arises in this connection, that such tribunal must be allowed the greatest possible latitude within only constitutional limitations in working out the problems before it without interference from the courts.

As a matter of fact, the record discloses that the respondent carriers had notice that annual reports would be referred to and considered in the proceeding. (Printed record, p. 74.) It was earnestly argued by counsel for plaintiffs that this could not be done without the formal introduction of the reports in evidence or such portions of them as the parties before the commission desired to have considered in their behalf. In one of the rules of the commission, however, appears this paragraph: "The commission will take notice of items in tariffs and annual and other periodical reports of carriers properly filed with it * * *." It is true that the same rule provides how the parties before the commission may direct the commission's attention to such reports by specifying and identifying the particular portion desired to be considered. It would seem that a liberal construction of this rule might be that the commission could under this rule, upon its own initiative, consider annual
485 reports of the carriers filed with the commission, whether formally introduced by the litigants or not. Certainly it has probative force in connection with the statement of the examiner, the official representative of the commission, that these reports were going to be used, of which the carriers had notice early in the proceeding. This, in connection with the admitted competency of the reports as evidence, would seem to me to be sufficient as to the form of introduction in a proceeding before the commission, if not in strict accordance with court procedure.

e. I do not agree with the contention of counsel for the plaintiffs that the matter before the commission was disposed of solely upon the theory of taking from the stronger and giving to the weaker. However, a fair interpretation of section 15, subdivision 6, of the transportation act would seem to imply that the commission may now take into consideration elements in determining the basis of joint rates which reflect in a degree the right of the commission to have as one of its chief purposes the building up of an effective transportation system throughout the country. In fact, the Supreme

Court has held this affirmatively in the Wisconsin case in construing the act before the recent amendment. (R. R. Commission of Wisconsin v. C. B. & Q. R. R. Co., 257 U. S. 585.) Does it not, therefore, logically follow that where the carrier is operating under such conditions as to make its operation from the standpoint of a financial success extremely difficult, but that the carrier is necessary to the service of the country through which it runs, that in the broad light of giving effective service to the people it becomes necessary to adopt the very broadest policies in the treatment of such a carrier? As a

concrete illustration, it is for the good of the people of Boston
486 to be able to ship goods to a point in Texas on the Orient Railway and so from any other portion of the United States. In the long run such a policy would not work as a hardship against the similar participation of other roads in a joint rate, but would generally, at least eventually, mean a greater amount of business for those roads. They could not, therefore, complain unless the Interstate Commerce Commission should order that they conduct their joint traffic with the Orient upon a basis which was confiscatory, but that question is not in this case, as the commission has not denied them relief growing out of the situation brought about by the lesser division to them of joint rates with the Orient.

As to a contribution by the stronger to the weaker, while not recognized as a basis for the determination of property rights, yet as a principle it does exist in every activity of life. The strong absorb the deficiencies of the weak. One customer of a merchant fails to pay his honest debt and that merchant as a result must charge a higher rate upon his products for sale, so that his loss is absorbed in the general business, and this burden falls upon those who do pay their debts. I am not seeking, however, to justify and sustain the order of the commission upon the basis that the commission has adopted in this case, the theory of taking from the stronger and giving to the weaker road, but in the general plan of carrying out the purposes of the transportation problem of the country as contained in the transportation act, and, as interpreted by the courts, it becomes necessary in a measure to distribute the burden so that the entire country will have the benefit, as far as may be possible, of efficient transportation facilities. As soon as it may be determined that a common carrier is a necessary servant for the community in which it exists, in which determination the commission is the sole arbiter, it then becomes necessary for the

Interstate Commerce Commission to see that it does exist,
487 which could not be brought about by the infliction of prohibitive high local rates not to be reasonably borne by the peoples and industries which the carrier immediately serves.

The principal ground upon which we all agree that enforcement of the order complained of must be restrained, if at all, is that there is a lack of sufficient substantial evidence in the record to sustain the order.

The main argument of counsel for plaintiffs upon this point is that without an introduction of division sheets showing what the divisions actually were, the commission had no evidence to base its finding of fact as to the division of joint rates to the Orient being unjust, unreasonable, or inequitable, and that in the absence of this or such a number of them for examples as would enable the commission to determine with a degree of accuracy the general trend of divisions, that there was no evidence before the commission upon this point. Counsel strongly rely upon the New England case in supporting this contention. It is true that the decision in the New England case by the commission was based upon evidence afforded through division sheets. It does not follow that the evidence in this or any other case must necessarily be based upon division sheets if the evidence can be presented to the commission in another form.

It is contended by counsel for the commission that the evidence in this case, while not in the form of division sheets, is much more complete and exhaustive than were division sheets relied upon, and I agree with counsel in this contention. Division sheets, unless tens of thousands were introduced in evidence, could only be used as samples in reflecting joint rates upon different commodities from which the commission would be required to draw general conclusions as to the fairness of all joint rates. In the case at bar the proceeds from joint rates were themselves definitely and accurately determined. (Printed record, exhibits 25 and 26.) By a process of computation the funds actually accruing from joint rates to the Orient and to its connections were determined, which as a problem gives the actual definite answer with relation to which the consideration of sample division sheets would only be an approximate guess.

Therefore all the evidence which would have been before the commission by the introduction of so-called sample division sheets, the commission had before it in the form of evidence determining the actual results in dollars and cents based upon joint rates between the Orient and its connections. This, in my opinion, would give a more substantial basis upon which to predicate any action by the commission than would division sheets for the reason that the method reflects the concrete result of all divisions of the joint rates in controversy. These amounts received were analyzed in connection with the tonnage and the ton-miles which the joint fund divided between the several carriers represented and afforded a basis of determining the revenue per ton-mile of all carriers concerned. A further analysis probably demonstrated that the Orient was receiving more for its service on the basis of per ton-mile than the majority of its carriers, which might be taken superficially to prove that the present divisions in force before the order of the commission went into effect were then just and equitable so far as the Orient was concerned. It is admitted, however, by both sides to this controversy that the per-ton-mile basis is not a fair one for sole use in determining divisions.

So many different elements enter into the determination of the cost of service that the per ton-mile should only be considered as one element. This was evidently the idea of the commission because it proceeded to go further in its investigations as to the elements
489 entering into the service required in carrying on joint traffic.

Many pages of the record are used in ascertaining the physical facts surrounding the operation of the carriers. With the Orient it was found that it operated under many conditions which were not common to railroads. The fact that it runs through a comparatively sparsely settled portion of the country, affecting its local traffic; that it does not have fuel and building material upon or in proximity to its line and thereby being compelled to pay tonnage to other lines in order to secure these necessary supplies; and that in the shipment of livestock, cement, etc., in proximity to its lines it must undergo a long haul of empty cars on account of there being only a one-way tonnage available, as well as other elements of difference in situation, compared with that of its connecting carriers. All of this data and material were gathered from the evidence itself introduced or from facts of which the commission should take judicial notice and were evidence in the case upon which the commission had the right to base a decision; that, all elements considered, the Orient was not receiving its fair and just proportion of joint rates. And, so far as this court is concerned, it is only incumbent upon the commission to secure its order against attack in this proceeding to demonstrate to this court that there was substantial evidence to support the order.

As was said by the Supreme Court in the recent case of *The Akron, Canton and Youngstown Railway Co. et al. v. The United States*, decided February 19, 1923, "to consider the weight of the evidence, or the wisdom of the order entered, is beyond our province."

Particular criticism is made of the tabulation found on page 404 of the report in that it purports to have been made up by the commission from the annual reports of the railroads before the com-

mission in this hearing in that, first, the reports ought not
490 to have been considered as evidence as heretofore suggested because not formally introduced in evidence, and second, that it purports to have been made up from the revenues of the railroads in their entirety and not from revenues accruing from divisions of joint rates, or even from freight as distinguished from passenger traffic. I consider that the latter criticism is in a way justified, but computations from these reports need only to be used in a sense as being persuasive that the division of joint rates to the Orient are inequitable. It must be admitted, I believe, that it would be absolutely impossible to determine with absolute accuracy the separate and distinct cost of carrying on joint traffic as distinguished from all other traffic which the road carries on, whether that traffic be freight or passenger, with a single train carrying both joint and other traffic, and otherwise subject to varying conditions. It would seem to me to be practically impossible to segregate the different classes of traf-

fie and say with respect to joint traffic there were a profit or loss, or with respect to other traffic there were a profit or loss. It would be difficult for a merchant to say with a degree of accuracy that the carrying of a specific bolt of cloth upon his shelves caused him to suffer a direct profit or a direct loss. It might be that the possession for sale of that particular bolt of cloth in itself might not reflect a profit, and yet its possession for the satisfaction of a single customer might bring a large profit accruing from the sale of his other materials in stock.

The compilation therefore as referred to might not be conclusive, independent of all other evidence, as proving the unfairness of the joint rates to the Orient and yet itself an element which the commission had the right to take into consideration; and, in fact, it 491 may be the best available method of securing in its larger sense a reflection of the fairness of a division of joint rates among carriers. This compilation shows generally a greater net revenue, in relation to operating expense, to plaintiff carriers than to the Orient.

If our conclusion be sound that there is in the record substantial evidence to sustain the order of the commission, it seems to me we do not arrive at the point of considering whether the percentage basis adopted by the commission with respect to the different roads were proper or otherwise. If that percentage should be unfair in some instances, the door of the commission is open to those who consider themselves aggrieved thereby. It is not for this court, untrained in the technical proposition of rate making, to presume to say that the divisions are too high or too low, especially until such time, as hereinbefore intimated, that the commission has established a rate which will work a confiscation of the property of the carrier. We can conceive that it might be found by the commission, upon these carriers feeling themselves aggrieved by the order and presenting evidence sustaining their contention of unfairness, that the commission might modify the percentages to suit the facts then before them, or the commission might upon application permit the joint carriers to profit by a raise in rate. This, however, is for the commission to determine and not the courts.

[File endorsement omitted.]

Order overruling motions to dismiss.

Filed Mar. 19, 1923.

The motions of the defendants to dismiss the bill of complaint, heretofore filed in this cause, having been considered by the court, and the court being now of opinion that neither of said motions is well taken;

It is ordered that each of said motions be, and the same is, overruled.

This 16th day of March, A. D. 1923.

ROBT. E. LEWIS,
U. S. Circuit Judge.
T. BLAKE KENNEDY,
U. S. District Judge.
J. FOSTER SYMES,
U. S. District Judge.

[File endorsement omitted.]

493

In United States District Court.

Order granting permanent injunction.

Filed Mar. 19, 1923.

After final hearing of this cause, including arguments of counsel for all of the respective parties, it was submitted to the court with leave to file briefs, which have been considered, and the court being now fully advised in the premises, it finds the issues in favor of plaintiffs, whereupon,

It is considered, ordered, and decreed that the temporary injunction heretofore granted be, and the same is now, made permanent and perpetual, and the defendants and all persons acting in their behalf are forever prohibited and enjoined from enforcing against the plaintiffs, and each of them, and their respective representatives, agents, and servants the said order made by the Interstate Commerce Commission, division 4, on the 9th day of August, 1922, wherein it found and ordered that the then existing divisions on freight traffic interchanged should be diminished as to the plaintiffs and increased in favor of the Kansas City, Mexico & Orient Railroad Company and its receiver, and the Kansas City, Mexico & Orient Railway Company of Texas, in the percentages of said existing divisions as in said order set forth. It is further ordered that the permanent writ of injunction may issue from the clerk's office on application of plaintiffs, or either of them, commanding as aforesaid.

It is further ordered that unless there be reversal on appeal from this decree, plaintiffs and their surety be and they are released from all obligation on their bond heretofore given in this cause, and that

none of the parties hereto shall recover its costs.

494 This 16th day of March, A. D. 1923.

ROBT. E. LEWIS,
U. S. Circuit Judge.
T. BLAKE KENNEDY,
U. S. District Judge.
J. FOSTER SYMES,
U. S. District Judge.

[File endorsement omitted.]

Petition for rehearing.

Filed Apr. 5, 1923.

United States of America, by its counsel, now comes and respectfully moves the court to vacate the order, entered March 16, 1923, granting the permanent injunction in the above-entitled cause, and to grant a rehearing, or for a modification of the opinion herein, and assigns as grounds therefor the following reasons, which it presents in good faith and which it believes are sufficient to warrant the court to grant the petition.

I

The opinion and judgment of the United States District Court for the Southern District of New York in the case of Akron, Canton & Youngstown Railway Co. v. United States, 282 Fed. Rep. 306, and the opinion and judgment of the Supreme Court of the United States in Akron, Canton & Youngstown Railway Co. v. United States, decided February 19, 1923, which affirmed the judgment of the District Court, were not sufficiently considered.

In the opinion in instant case the only reference to the foregoing opinions is as follows:

"Neither side claims that the New England Divisions case (66 I. C. C. 196, 282 Fed. 306) is controlling or even helpful here. It was said by the court in 282 Fed. 313: 'The question before the commission was the apportionment of the joint fund in proportion to the services rendered.' The divisions there under consideration had stood for thirty years, the relations of the carriers to the joint service and the advantages and burdens imposed on each had greatly changed, the grounds on which the New England roads asked relief were definitely set out, wherein the changed conditions to their relative disadvantage is made to appear, and the District Court said the evidence sustained the claim. On appeal of that case the Supreme Court said (opinion filed Feb. 19): 'An order, regular on its face, may, of course, be set aside if made to accomplish a purpose not authorized. * * * It is not true, as argued, that the order

496 compels the strong railroads to support the weak,' and that the increase given to the New England lines on the new division was all paid out of the rate increase ordered in Ex parte 74; and in a footnote: 'Papers on the commission's files are not a part of the record in a case, unless they are introduced as evidence.'"

Bearing in mind the generous and patient consideration the judges of this court accorded to the counsel for the parties during two protracted hearings, it is now respectfully submitted that the foregoing paragraph neither correctly gives the position of the counsel at the bar with respect to the New England Divisions case nor sufficient

consideration to the opinions of the District Court and the Supreme Court.

The sentence "Neither side claims that the New England Divisions case (66 I. C. C. 196, 282 Fed. 306) is controlling or even helpful here" is not sustained by the documents in the record.

On the hearing of the application for temporary injunction, September 30, 1922, the main argument of counsel for the United States in opposition to the application was that the opinion of the District Court, Southern District of New York (Circuit Judges Hough, Manton, and Mayer all concurring) was persuasive against the plaintiffs in the instant case; and the fact was mentioned and emphasized that while plaintiffs in this case, on that hearing, had filed a brief of 72 printed pages they studiously avoided any reference thereto. The transcript of the stenographer's notes will disclose that counsel for the Government read at almost undue length from Circuit Judge Manton's opinion on both hearings.

The statement by this court that "Neither side claims that the New England Divisions case is controlling or even helpful here" was certainly not the impression of counsel for the plaintiffs, who, in their elaborate brief on the final hearing, reviewed at length the stenographer's notes of the argument previously made by counsel for the United States, with respect to which they say (p. 54):

"In the New England case, upon which counsel for the United States relied in oral argument (Argument, p. 84) and upon which we rely even more confidently, the commission showed in its decision much evidence, and the United States District Court supported its order because there was so much well-considered evidence in the record that the order could not be held arbitrary. [Italics ours.] "

497 Moreover, after two oral arguments at the bar the court generously allowed counsel for the United States to file a short brief. Point VI, the last paragraph, is as follows:

"The opinion of the District Court for the Southern District of New York (Circuit Judges Hough, Manton, and Mayer) is confirmatory of all that the commission did in the instant case. Akron, Canton & Youngstown Railway Co. v. United States, 282 Fed. Rep. 306.

"The preliminary injunction should be dissolved and the bill should be dismissed."

The final hearing was held at Denver, November 27, 1922. The appeal in The New England Divisions case was not argued before the Supreme Court of the United States until January 11, 1923. The final opinion and judgment of that court was announced on February 19, 1923, or more than two months after the instant case was argued and submitted. While both the main opinion and the dissenting opinion in the instant case indicate that the opinion of the Supreme Court was before this court when it decided this case, it could not well be said that "Neither side claims that the New England Divi-

sions case is controlling or even helpful here," as neither side was ever heard on the subject after the Supreme Court decided the case.

It is respectfully submitted that the opinion of the court neither correctly states the argument of counsel nor gives sufficient consideration to the opinion of the Supreme Court in The New England Division case.

II.

In Dayton-Goose Creek Railway Co. v. United States, in Equity No. 262, United States District Court, Eastern District of Texas, at Beaumont, the District Court (Circuit Judges Walker and King and District Judge Foster) had under submission on briefs and arguments, after a hearing on application for preliminary injunction, and motion of the United States to dismiss the petition, a case involving the validity of the so-called recapture clauses of the transportation act.*

The opinion and order denying the application and sustaining the motion were announced and filed March 15, 1923, or one day before the issuance of the permanent injunction in the instant case. The two cases were under submission at the same time. Using

* Section 422, paragraphs (5) and (6), of the transportation act (41 Stat 489) provides:

"(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

"(6) If under the provisions of this section any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purpose of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the commission in the manner provided in paragraph (4).

499 the opinion of the Supreme Court of the United States as a basis for its own opinion, and quoting therefrom, the District Court for Eastern District of Texas said:

"The Congress determined that its powers to regulate interstate commerce must now be exercised to a wider extent than before, in order that an adequate system of interstate transportation should be preserved for the commerce of the country. To that end it greatly enlarged the powers of the Interstate Commerce Commission. It empowered it to group the railroads of the country, to prescribe rates adequate to a fair remuneration of each of the members of such groups, and to order proper divisions of such joint rates. It could also prescribe minimum as well as maximum rates. It could exercise such control over intrastate rates as would prevent discriminations against interstate or foreign commerce. It could control the issuance of railroad securities, the building of additional roads, and the abandonment of existing lines, so far as they were interstate carriers. It could plan and recommend the consolidation of all the railroads of the country into a number of interstate systems, not being necessarily restrained by existing competition.

"The scope of this act and the departure therein from former limitations on the regulation of interstate commerce have been the subject of recent consideration by the Supreme Court of the United States in the case of *The Akron, Canton and Youngstown Railway Company et al. v. The United States of America et al.* (The New England Divisions case), opinion rendered February 19th, 1923.

"In this opinion it is said:

"Transportation act, 1920, introduced into the Federal legislation a new railroad policy. Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563, 585. Therefore, the effort of Congress had been directed mainly to the prevention of abuses, particularly those arising from excessive or discriminatory rates. The 1920 act sought to insure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the commission, new powers were conferred and new duties were imposed.

500 "The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit to what the traffic would bear. A five per cent increase had been granted in 1914, *The Five Per Cent case*, 31 I. C. C. 351; 32

I. C. C. 325; fifteen per cent in 1917, The Fifteen Per Cent case, 45 I. C. C. 303; twenty-five per cent in 1918, General Order of Director General, No. 28. Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and their widely varying earning power was fully realized.

"Among other provisions the act provided substantially that all railroads should hold one-half of the excess of net earnings over 6 per cent net on the valuation of its property as fixed by the commission after paying expenses, as trustee for, and pay the same to, the United States. These sums were to be collected by the Interstate Commerce Commission and used by it in furtherance of the public interest in railway transportation either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally used for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers'; sums so collected and accretions thereof to constitute a revolving fund to be used for the purposes stated. Transportation act, 1920, section 422, 41 Stat. 456, 488.

"This provision is attacked as unconstitutional, on the ground that it takes the property of the carrier from whom such per cent of excess earning is collected without compensation, and denies to it due process of law, and also on the ground that the requirement, 501 so far as it embraced any earning from intrastate rates, was beyond the power of Congress."

In The New England Divisions case, *supra*, Mr. Justice Brandeis further said:

"It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted: The group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshalling the revenues, partly through capital account, it was planned to distribute augmented earnings, largely in proportion to the carrier's need. This, it was hoped, would enable the whole transportation system to be maintained, without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable.

"Raising joint rates for the benefit of the weak carriers might be the only feasible method of obtaining currently the needed revenues. Local rates might already be so high that a further increase would kill the local traffic. The through joint rates might be so low that they could be raised without proving burdensome. On the

other hand, the revenues of connecting carriers might be ample; so that any increase of their earnings from joint rates would be unjustifiable. Where the through traffic would, under those circumstances, bear an increase of the joint rates, it might be proper to raise them, and give to the weak line the whole of the resulting increase in revenue. That, to some extent, may have been the situation in New England, when, in 1920, the commission was confronted with the duty, under the new section 15a, of raising rates so as to yield a return of substantially 6 per cent on the value of the property used in the transportation service. *Ex parte 74, Increased Rates, 1920, 58 I. C. C. 220.*

502 The language of the Supreme Court with respect to "weak lines," their "prosperous competitors," the "widely varying earning power of the several lines" and "their varying needs," the "recapture from prosperous competitors of surplus revenues," how "the weak were to be helped by preventing needed revenue from passing to prosperous connections," and thus "by marshalling the revenues," it was planned "to distribute augmented earnings" which "would enable the whole transportation system to be maintained," is all highly appropriate here.

What was said in the opinion of the Supreme Court respecting the scope of the transportation act and the various sections thereof was made after full discussion of all of those subjects at the bar and after solemn deliberation thereon by the court. It is submitted that the opinion is just as conclusive of the validity of the order in the instant case as if the order had been the immediate subject of the controversy.

If the court thinks otherwise, then it is submitted that the opinion in *The New England Divisions case* is so highly persuasive as to be controlling.

III.

The transportation act is entitled, "An act" (a) "to provide for the termination of Federal control * * *"; (b) "to provide for the settlement of disputes between carriers and their employees;" (c) "to further amend" the act to regulate commerce of 1887, as amended (41 Stat. 456), approved February 28, 1920. It consists of five titles, viz. I.—Definitions; II.—Termination of Federal control; III.—Disputes between carriers and their employees and subordinate officials; IV.—Amendments to interstate commerce act; V.—Miscellaneous provisions.

Inter alia, in order "to best promote the service in the interest of the public and the commerce of the people" (41 Stat. 476, 477); to "best meet the emergency and serve the public interest," * * * "properly to serve the public" (41 Stat. 477); "that the public interest will be promoted" (41 Stat. 482); to consider "the transportation needs of the country" (41 Stat. 488); to meet the necessity of enlarging the facilities "in order to provide the people of 503 the United States with adequate transportation" (41 Stat. 488); "in the interest of the commerce of the United States as

a whole" (41 Stat. 489); to enable the carriers "properly to meet the transportation needs of the public" (41 Stat. 491), the Congress of the United States, in enacting the transportation act of 1920, proceeded along comprehensive lines.

In enacting the transportation act the Congress considered the transportation system throughout the continental United States as a whole. The Congress enacted the broad provisions to raise revenue, to prescribe divisions, to provide for settlement of disputes between carriers and their employees, to recapture excess earnings, and for other equally important purposes (Railroad Commission of Wisconsin v. C. B. & Q. R. R. Co., 257 U. S. 563; State of New York v. United States, 257 U. S. 591; Lehigh Valley Railroad Co. v. Public Service Commission, 272 Fed. Rep. 758, 767; City of New York v. United States, 272 Fed. Rep. 768; New England Divisions case, 282 Fed. Rep. 306; affirmed New England Divisions case, No. 646, Supreme Court, October Term, 1922, decided February 19, 1923; Pennsylvania Railroad v. Railroad Labor Board, No. 585, Supreme Court, October Term, 1922, decided February 19, 1923), in order to maintain an adequate transportation system throughout the United States.

In its entire history the Congress never passed an act in which the sections were so closely interlocked and dependent each upon the other as in the case of the transportation act, as the Congress was considering "the transportation needs of the country."

In cases thus far decided both the District Courts and the Supreme Court, in approaching the subject, have persistently exercised the judicial power with a scope coextensive with that of the congressional enactment and have kept the entire transportation act and all of the carriers subject thereto in full view at all times, to the end that all of the incidents to the development of an adequate transportation system may move forward at once and together.

504 In view of the statement of the court that the counsel did not rely on The New England Divisions case in the instant case, and as counsel will rely on that opinion in the Supreme Court, in the event of an appeal, it is but fair to the court and to the counsel that the cause should be reargued here.

In view of the foregoing considerations, the Government respectfully prays that a rehearing be granted herein or that the opinion be modified.

JAMES M. BECK,

Solicitor General.

BLACKBURN ESTERLINE,

Assistant to the Solicitor General.

I certify that in my opinion the foregoing petition is well founded.

BLACKBURN ESTERLINE,

Assistant to the Solicitor General.

[File endorsement omitted.]

In United States District Court.

Answer of carriers to the petition of the United States for rehearing.

Filed June 16, 1923.

I.

The United States files a petition for rehearing on the ground that the decision (February 19, 1923) of the Supreme Court in the New England Division case (*Akron, etc., v. United States, — U. S. —*), as well as the decision of the district trial court, was "not sufficiently considered."

As the decision in the case at bar turns upon a lack of evidence to support the order of the commission, and as the commission's record and the record of the United States District Court in the New England case disclose oral and documentary evidence without limit on nearly every aspect of the subject of divisions, this court would have "sufficiently considered" the decision in the New England case had it altogether omitted reference to it.

Again, the New England case was totally dissimilar to this in that the carriers petitioning for better divisions had for half a century or more been solvent and successful. They were not asking for financial help as such—they complained only of an unfair division of the day's pay on the basis of work performed by each. That issue, the only one properly in a division case, did not appear at all in the case at bar.

In view of the foregoing there was nothing decided by the Supreme Court in the New England case relevant to the commission's order or the court's decision in this case. Therefore, what the Supreme Court said in that case was no more applicable to the issue decided here than what it said in some patent case or a case in admiralty.

The assumption of counsel for the United States that the decision in the New England case was "not sufficiently considered" is based upon this remark of the court in the case at bar (p. 17 of printed opinion):

"Neither side claims that the New England Divisions case (66 L. C. C. 196, 282 Fed. 306) is controlling or even helpful here. It was said by the court in 282 Fed. 313: 'The question before 506 the commission was the apportionment of the joint fund in proportion to the services rendered.' The divisions there under consideration had stood for thirty years, the relations of the carriers to the joint service and the advantages and burdens imposed on each had greatly changed, the grounds on which the New England roads asked relief were definitely set out, wherein the changed conditions to their relative disadvantage is made to appear, and the District Court said the evidence sustained the claim."

Notice carefully the words of the eastern court quoted by this court: "In proportion to the services rendered." That is the subject matter of a division case. The proportion and value of work done by the respective carriers were not ascertained in the case at bar.

In the foregoing statement of the circumstances and conditions characterizing the New England case this court shows clearly the fundamental differences between that case and the one here. In the present case the question before the commission was not of the apportionment of the joint fund in proportion to the services rendered; the divisions had not stood for thirty years; the relations of the carriers to the joint service and the advantages and burdens imposed on each had not greatly changed; there was no evidence here to support the order as there was in the New England case.

That is what the court in this case means by saying that neither side claims the New England case to be decisive—it could not be decisive when the record made there bears no resemblance to the record here.

But counsel for the United States read in oral argument from the District Court's opinion in the New England case with the purpose of making the deduction that since there was evidence to support the commission's order in the eastern case there must necessarily have been evidence in the case at bar. At least, we could see no other purpose in the reading.

On the other hand, we referred to the New England case at page 54 of our opening brief and stated that we relied upon it even more confidently than counsel for the Government did, not as decisive of any legal question before this court, but as illustrating that the commission knew perfectly well how to try a division case. As it knew

perfectly well how to try a division case, why did it not in the 507 case at bar require evidence on divisions that were unreasonable or inequitable under the law to the Orient? To that proposition we cited the New England case, not that it decided any question in this case, but that it illustrated how very badly this case was tried by the commission. We used the New England case to show that there the commission's record contained very full information of divisions themselves, of their remaining unchanged for thirty years, of the radical changes in transportation conditions, of the short hauls in New England (akin to costly switching in some instances), and—most important of all—of the relative service done or work performed by the carriers participating in the division of a rate. All those essentials, we argued, fully covered by evidence in the New England case, were missing from the Orient case.

In the eastern case the commission rendered a decision favorable to the New England carriers only upon the matters respecting which adequate evidence had been presented, very explicitly refusing relief where the evidence was insufficient. We believe that what the commission stated in the New England case, and what the District Court

found in the record, went to show that the commission knew better than *to make such a record as it had made in the case at bar.*

But we did not, as said before, rely upon the New England case as decisive of any legal question before this court, for the issues joined and the facts of procedure made the cases as dissimilar as are white and black.

II.

Nor does anything that was said (March 15, 1923) by the three-judge District Court of the United States for the Eastern District of Texas, in Dayton-Goose Creek Railway Company v. United States, — Fed. —, cited by counsel for the Government, have any bearing on the case at bar. The Dayton-Goose Creek case is just as dissimilar to the case before us as one case could be unlike another. It involved simply the question of the constitutionality of the miscalled "recapture" provisions of section 422 of the transportation act (41 Stat. 489), which is section 15a of the interstate commerce act.

508 As it appeared by admission of plaintiff in the Dayton-Goose Creek case that the complainant company had earned in excess of six per cent and was therefore bound to yield up the trust fund if the provision of the law was constitutional, there was involved nothing like the question of the sufficiency of the evidence in the case at bar. Therefore, the language of the District Court from which counsel for the Government quotes at page 7 of the petition for rehearing, which language deals with the "wide powers" that Congress intended the commission to have, does not mean that Congress intended to give to the commission power to make an order without evidence to support it.

Nor does anything quoted by the District Court of Texas from the Supreme Court of the United States in the Wisconsin case (Railroad Com., etc., v. C. B. & Q., 257 U. S. 563) regarding the purpose of Congress to insure adequate transportation service contain anything suggesting that the national legislature intended to set aside the holding in the Louisville & Nashville case (227 U. S. 88), namely, that a record fully sustaining the order of the commission must be made by the commission in the presence of the defendant carriers.

The Wisconsin case did not involve divisions even indirectly. The question was of the constitutional power of Congress to remove discrimination "as between persons and localities" and "against interstate or foreign commerce" arising out of State rates. Therefore all language in the opinion respecting the enlarged powers of the commission relates, not to the question decided in the case at bar, but to the constitutional question there decided. The "enlarged powers" under which the commission acted in the Wisconsin case are given in section 14 (4) of the interstate commerce act, while

the powers exerted in the case at bar are bestowed by section 15 (6).

And the power under consideration by the District Court in the Dayton-Goose Creek case is granted by section 15a (6).

So the language in a decision of a case arising under section 14 (4), or in a case springing from section 15a (6), has weight only in the connection used—it is perversion to apply it to a case brought under section 15 (6).

509 "The opinion of a court must always be read in connection with the facts upon which it is based." Doyle v. Continental, etc., 94 U. S. 535 (538).

"But these expressions are to be understood in their application to the facts of the cases decided." Hanover, etc., v. Metcalf, 240 U. S. 403 (415).

General expressions are to be taken in connection with the case in which they are used. Cohens v. Virginia, 6 Wheat. 264 (398).

The Supreme Court of the United States has often expressed disapproval of the practice of separating its language from the context and quoting it in dissimilar cases.

III.

Finally, the decision of the Supreme Court of the United States in the New England Division case, quoted at page 10 of the petition for rehearing, merely discusses the new plan of Congress to insure earnings to weak as well as strong carriers and to prevent, by a return of earnings held in trust, excessive revenue to the more fortunate or powerful lines in a rate group. But nothing is contained in the language quoted or found elsewhere in the opinion of the Supreme Court justifying a record by the commission in a division case without evidence to support it.

What has been said disposes of the matter contained in Division III of the petition of the Government for rehearing about the transportation act, "in which the sections were so closely interlocked and dependent each upon the other." In that act Congress betrayed no intention of overturning the rules and practices prevailing in trials wherever the English language is used. It is now more than ten years since the Supreme Court held in the Louisville & Nashville case (227 U. S. 88) that "the more liberal the practice in admitting testimony" before the Interstate Commerce Commission, "the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended." It is certainly significant that in no legislation since 1913 has Congress so much as hinted that the venerable trial practice of Englishmen and Americans should be in the least modified, to say nothing of being abrogated altogether. Such a

510 change can not be thought of until it is found ordered in the clearest of language—it can not be inferred from general ex-

pressions contained in cases dealing with subject matters entirely alien to that disposed of by the court in this case.

J. M. WAGASTAFF,	O. E. SWAN,
W. R. SMITH,	C. S. BURG,
T. J. NORTON,	W. W. BROWN,
W. F. DICKINSON,	C. C. HUFF,
LUTHER BURNS,	H. H. LARIMORE,
ORVILLE BULLINGTON,	W. P. WAGGENER,
KENNETH F. BURGESS,	W. F. EVANS,
J. H. BARWISE, Jr.	M. G. ROBERTS,
FRED H. WOOD,	R. R. VERMILION,
GARDINER LATHROP,	GEORGE THOMPSON,

Solicitors for all Plaintiffs.

[File endorsement omitted.]

511 In United States District Court.

Order denying motion for rehearing.

Filed May 2, 1923.

The motion of defendant, United States of America, for a rehearing in this cause came on to be heard, and on consideration thereof:

It is ordered that said motion be and the same is denied and overruled.

ROBT. E. LEWIS,
Circuit Judge.
T. BLAKE KENNEDY,
District Judge.
J. FOSTER SYMES,
District Judge.

[File endorsement omitted.]

512 In United States District Court.

Petition for appeal by United States of America and Interstate Commerce Commission.

Filed May 9, 1923.

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, feeling themselves aggrieved by the final order or decree of the District Court dated March 16, 1923, pray an appeal to the Supreme Court of the United States therefrom.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

Defendants pray that the transcript of the record, proceeding and papers on which the final order or decree was made and entered duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

AL F. WILLIAMS,

United States Attorney, District of Kansas, Second Division.

BLACKBURN ESTERLINE,

Assistant to the Solicitor General.

J. CARTER FORT,

Solicitor for Interstate Commerce Commission.

[File endorsement omitted.]

513

In United States District Court.

Assignment of errors by and on behalf of the United States of America and Interstate Commerce Commission.

Filed May 9, 1923.

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, now come by their respective counsel and in connection with the petition for appeal, file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court dated March 16, 1923.

The District Court erred:

I. In issuing the temporary injunction.

II. In not sustaining the motion of the United States to dismiss the bill for injunction.

III. In overruling the motion of the Interstate Commerce Commission to dismiss the bill for injunction and in not sustaining the motion.

IV. In deciding, holding, and adjudging as follows:

"Both respondents have filed motions to dismiss and it is claimed that they should be sustained because this proceeding was prematurely brought. It is argued that inasmuch as section 16-1 of the act gave the plaintiffs the right to apply to the commission for a rehearing, that remedy should have been exhausted before this suit could be instituted. The application for a rehearing does not operate to stay the execution of the commission's order. The act provides that it be not stayed on such an application unless the commission by special order grants a stay. Nothing could have been done by plaintiffs pending application for rehearing that would have stayed the execution of the order as a matter of right. We think plaintiffs were entitled to take the order as final for the purpose of this proceeding. (See Chicago Ry. Co. v. Illinois Commerce Co., 277 Fed. 970.)"

V. In deciding, holding, and adjudging as follows:

"There is no evidence in the record as to what the divisions of tariffs between the plaintiffs, or any of them, and the Orient were,

unless those facts, necessary as a basis to support the commission's order, can be gleaned from the exhibits. There is no evidence in the record as to the amount and cost of service rendered by plaintiffs in the handling of interchange traffic, or any other proof tending to show that their proportions of divisions therefor were 'unjust, unreasonable, inequitable, or unduly preferential or prejudicial' as between plaintiffs and the Orient, nor that the divisions prescribed by the commission in its order are 'just, reasonable, and equitable' divisions as between them, unless those facts also can be adduced from some of the exhibits. Confessedly, from the arguments of counsel and their briefs, the issue comes down to the inquiry whether or not the necessary facts in support of the commission's order can be found in the exhibits. Otherwise, there is no proof on which the order can be rested. The necessities of a carrier, and the fact that it is being operated at a deficit, has been repeatedly held by the commission to not be a sufficient ground on which to order an increase of divisions in favor of the failing carrier. The building of a line into nonsupporting territory or into a field already adequately served can not be justly debited to other carriers, and as between the latter the fact that some have immediate connections seems wholly negligible as a ground of distinction. *Federal V. R. R. Co. v. Toledo & Ohio Ry. Co.*, 68 I. C. C. 499; *Laona & L. R. Co. v. Milwaukee S. P. & S. M. Ry. Co.*, 52 I. C. C. 7; *McGowan-Foshee L. Co. v. Florida A. & G. R. Co.*, 51 I. C. C. 317. Participating carriers in a joint service are entitled to be compensated in proportion to the amount of service and the cost of the service which they each render, and the fact that one of them is prosperous and the other not will not override the just right of each to a fairly proportionate share out of the joint earnings, whether the amount distributed to each be fully compensatory or be less to each than the value of the services so rendered. *Pittsburgh & W. Va. Ry. Co. v. Pittsburgh & Lake Erie Co.*, 61 I. C. C. 272; *New England Divisions case*, 66 I. C. C. 196.

515 VI. In deciding, holding, and adjudging as follows:

"We appreciate the fact that the ability of the commission to make proper deductions and conclusions from statistics embodied in these exhibits, with which it is their duty to constantly deal, is far greater than ours; but after prolonged study of these exhibits we have been unable to find in them any proof which in our judgment tends to show what the existing divisions were, or to support a conclusion that those divisions are unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the participating carriers."

VII. In deciding, holding, and adjudging as follows:

"The annual reports from which the commission obtained and used its data as proof covered all of the business of the 13 plaintiffs, both freight and passenger, the lines of some of them extending through many States—one from Chicago to California, and others serving territory equal in extent—and we are unable to understand

how the deductions made by the commission from the annual reports may be considered to any extent as a helpful guide in determining whether the divisions of freight rates on traffic interchanged with the Orient were unfair or inequitable, or as contributive facts in determining just and equitable divisions between them. We think they added nothing to the facts in the record for the solution of the issue before the commission under section 15(6) of the act. It seems to us that the inquiry was not directed to an ascertainment of the relative amount and cost of service on interchange traffic as between the Orient and the plaintiffs, and that there is no proof, including the annual reports, which will sustain a conclusion that existing divisions were unjust and inequitable at the time the order was made. The order is said to be of the blanket type. It cut through all existing divisions alike and took from each carrier a uniform per cent and added it to the Orient's share under the old divisions. A comparison of those per cents with the per centums of railway operating income discloses that the greater the income of plaintiffs the greater the increase allowed the Orient by deductions from the more prosperous roads. This was the method of relief proposed by the Orient in its application."

VIII. In deciding, holding, and adjudging as follows:

"So that it seems obvious to us that the phrase in paragraph 6 so much relied upon intends that all of the subjects named for consideration have application only where the inquiry goes to the extent of both fixing and dividing the joint rates; and that where it extends only to a division of existing rates, some of the things named for consideration by the commission have no relevancy to or weight in determining what the new divisions shall be. In such an investigation we think the controlling inquiry must necessarily

516 be directed to ascertaining the amount and cost of service to each of them. It is not shown that the Orient maintains switching and terminal facilities for joint use, or is otherwise specially burdened at points of exchange, or that it is put to unusual expense in the joint service. It does show it makes empty hauls; but that, we take it, is true of all roads, especially when there is heavy movement to market. It is said that none of the territory along its line produces coal and lumber, and that it must receive those commodities, which it is required to use, from its connections at a charge for their service; but, so far as the proof discloses, that may be true also of some or all of the plaintiffs. In short, we find no facts in the record which sustain the order, except the broad proposition, amply supported by proof, that the Orient is not self-sustaining and needs help; but we can not assent that the commission is empowered to compel prosperous roads, because they are prosperous, to contribute their services to the sustenance of weak roads, because they are weak. The character of the inquiry and the character of the order force us to the conclusion that that was what the commission intended to do and did do."

IX. In deciding, holding, and adjudging as follows:

"Neither side claims that the New England Divisions case (66 I. C. 196, 282 Fed. 306) is controlling or even helpful here. It was said by the court in 282 Fed. 313: 'The question before the commission was the apportionment of the joint fund in proportion to the services rendered.' The divisions there under consideration had stood for thirty years, the relations of the carriers to the joint service and the advantages and burdens imposed on each had greatly changed, the grounds on which the New England roads asked relief were definitely set out, wherein the changed conditions to their relative disadvantage is made to appear, and the District Court said the evidence sustained the claim. On appeal of that case the Supreme Court said (opinion filed Feb. 19): 'An order, regular on its face, may, of course, be set aside if made to accomplish a purpose not authorized. * * * It is not true, as argued, that the order compels the strong railroads to support the weak,' and that the increase given to the New England lines on the new division was all paid out of the rate increase ordered in Ex parte 74; and in a footnote: 'Papers on the commission's files are not a part of the record in a case, unless they are introduced as evidence.'"

X. In deciding, holding, and adjudging as follows:

"It follows that the annual reports and the data which they contain were not made a part of the record, and were not properly before the commission for consideration in reaching its conclusion."

517 And then considering, of its own motion, the annual reports and the data which they contain or as compiled therefrom as not sufficient evidence or any evidence to support the order of the commission, thus substituting the judgment of the court for that of the commission on whether (1) the reports were before the commission and (2) the effect thereof.

XI. In deciding, holding, and adjudging that the annual reports and the data which they contain or as compiled therefrom were not a part of the record before the commission for the purpose of sustaining the order and then considering the same as a part of the record before the court for the purpose of annulling and enjoining the order.

XII. In deciding, holding, and adjudging that the order of the commission is invalid because of failure to join other carriers who participated in the joint rates affected by the order.

XIII. In deciding, holding, and adjudging that the order of the Interstate Commerce Commission was without substantial evidence to support it.

XIV. In deciding, holding, and adjudging that the order of the Interstate Commerce Commission, entered August 9, 1922, was beyond its power.

XV. In entering the following final order or decree, viz:

"After final hearing of this cause, including arguments of counsel for all of the respective parties, it was submitted to the court with

leave to file briefs, which have been considered, and the court being now fully advised in the premises, it finds the issues in favor of plaintiffs, whereupon,

"It is considered, ordered, and decreed that the temporary injunction heretofore granted be and the same is now made permanent and perpetual, and the defendants and all persons acting in their behalf are forever prohibited and enjoined from enforcing against the plaintiffs, and each of them, and their respective representatives, agents, and servants the said order made by the Interstate Commerce Commission, division 4, on the 9th day of August, 1922, wherein it is found and ordered that the then existing divisions on freight traffic interchanged should be diminished as to the plaintiffs and increased in favor of the Kansas City, Mexico & Orient Railroad Company and its receiver, and the Kansas City, Mexico & Orient Railway Company of Texas, in the percentages of said existing divisions as in said order set forth.

518 "It is further ordered that the permanent writ of injunction may issue from the clerk's office on application of plaintiff, or either of them, commanding as aforesaid.

"It is further ordered that unless there be reversal on appeal from this decree, plaintiffs and their surety be and they are released from all obligation on their bond heretofore given in this cause, and that none of the parties hereto shall recover its costs.

"This 16th day of March, A. D. 1923."

XVI. In not granting the petition for rehearing seasonably filed

Wherefore, defendants, and each of them, pray that the final order or decree of the District Court may be reversed, annulled, and set aside, with directions that the interlocutory and permanent injunctions shall be dissolved and the bill for injunction dismissed, and for such other and further order as may be appropriate.

AL F. WILLIAMS,

*United States Attorney, District of
Kansas, Second Division.*

BLACKBURN ESTERLINE,

Assistant to the Solicitor General.

J. CARTER FORT,

Solicitor for the Interstate Commerce Commission.

[File endorsement omitted.]

519

In United States District Court.

Notice to attorney general of State of Kansas of appeal.

Filed May 9, 1923.

To the Honorable Charles B. Griffith, attorney general of the State of Kansas:

You are hereby notified that the defendants above named have taken an appeal from the final decree of the District Court to the Supreme Court of the United States and that the order allowing

the appeal makes the same returnable within thirty (30) days from the date of the order.

This notice is given you pursuant to Urgent Deficiencies Act, October 22, 1913 (38 Stat. 221).

AL F. WILLIAMS,

United States Attorney, District of Kansas, Second Division.

BLACKBURN ESTERLINE,

Assistant to the Solicitor General.

MAY 1, 1923.

Service of a copy of the within notice is hereby admitted and acknowledged this 8th day of May, 1923.

CHARLES B. GRIFFITH,

Attorney General of Kansas.

By JOHN G. EGAN,

Asst. Atty. Genl. of Kansas.

[File endorsement omitted.]

30 In United States District Court.

Order allowing appeal of United States of America and Interstate Commerce Commission.

Filed May 12, 1923.

In the above-entitled cause, United States of America, defendant, and Interstate Commerce Commission, intervening defendant, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered to the Supreme Court of the United States.

May 10, 1923.

ROBT. E. LEWIS,

*United States Circuit Judge, and Presiding Judge
in the Above-entitled Cause.*

[File endorsement omitted.]

21 In United States District Court.

Order enlarging time for docketing appeal and filing record.

Filed May 12, 1923.

The record being voluminous and good cause being shown, it is ordered that the time within which the appellants shall docket the appeal and file the transcript of record thereof with the Clerk of

the Supreme Court of the United States be, and the same is hereby enlarged and extended until July first, 1923.

ROBT. E. LEWIS,

*United States Circuit Judge, and Presiding Judge
in the Above-entitled Cause.*

[File endorsement omitted.]

In United States District Court.

Præcipe for record.

Filed May 31, 1923.

To the Clerk:

Please prepare a transcript of the record in the above-en-titled cause in the matter of the appeal of the United States 522 of America and the Interstate Commerce Commission and include therein, in the order given below, the following matter, viz:

1. Bill for injunction.
2. Motion of the United States to dismiss and answer of the United States.
3. Motion to dismiss and answer of the Interstate Commerce Commission.
4. Certified copy of the record before the Interstate Commerce Commission in a proceeding entitled "Kansas City, Mexico & Orient Division," No. 13,668.
5. Order granting application for temporary injunction.
6. Testimony and exhibits introduced at final hearing.
7. Opinion of the court and dissenting opinion.
8. Final decree.
9. Journal entries in their appropriate order.
10. Petition for rehearing.
11. Answer of the carriers to petition for rehearing.
12. Petition for appeal.
13. Assignment of errors.
14. Order allowing appeal.
15. Order extending time to prepare transcript and docket appeal.
16. Notice of appeal to Attorney General of Kansas.
17. Præcipe for record.
18. Citation.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
J. CARTER FORT,
Solicitor for Interstate Commerce Commission.

Service of a copy of the within præcipe for record is hereby ad-mitted and acknowledged this 28 day of May, 1923.

T. J. NORTON,

M. G. ROBERTS,

Solicitors for Appellees.

In United States District Court.

Order enlarging time for docketing appeal and filing record.

Filed June 22, 1923.

The record being voluminous and good cause being shown, it is ordered that the time within which the appellants shall docket the appeal and file the transcript of record thereof with the Clerk of the Supreme Court of the United States be, and the same is hereby, enlarged and extended until August first, 1923.

ROBERT E. LEWIS,

*United States Circuit Judge, and Presiding Judge
in the Above-entitled Cause.*

O. K.:

T. J. NORTON,
M. G. ROBERTS.

[File endorsement omitted.]

524

Clerk's certificate.

UNITED STATES OF AMERICA,

District of Kansas, Second Division, ss:

I, F. L. Campbell, clerk of the United States District Court for the District of Kansas, Second Division, do hereby certify that the foregoing is a true, full, and complete transcript of the pleadings, proceedings, and record as the same are designated in the praecipe for record, stipulations of counsel, and order of the court for the settlement of the transcript of the record for the appeal to the Supreme Court of the United States, in a certain case in equity, wherein the Abilene and Southern Railway Company et al. are plaintiffs and The United States of America is defendant, and the Interstate Commerce Commission is intervening defendant, Number 278-N, as fully as the same remain on file and of record in said cause in my office.

And I further certify that the original citation is prefixed hereto and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in the city of Wichita, in said district, this 20th day of July, A. D. 1923.

[SEAL.]

F. L. CAMPBELL,
Clerk U. S. District Court.
By ELIZABETH LINTON,
Deputy Clerk.

525 In the Supreme Court of the United States,

October term, 1923.

[Title omitted.]

Stipulation as to parts of record to be printed.

Filed Nov. 27, 1923.

By their respective counsel the parties stipulate that the appellants shall furnish to the clerk for the use of the court and the clerk in the hearing of this appeal a sufficient number of printed copies of the exhibit styled "Certified copy of the record before Interstate Commerce Commission in a Proceeding Entitled 'Kansas City, Mexico & Orient Divisions, No. 13668,'" and that in printing the transcript the clerk may omit the reprinting of that exhibit.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

J. CARTER FORT,
Solicitor for Interstate Commerce Commission.

T. J. NORTON,
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(Indorsement on cover:). File No. 29,766. Kansas D. C. U. S. Term No. 456. The United States of America and Interstate Commerce Commission, appellants, vs. Abilene & Southern Railway Company, The Atchison, Topeka & Santa Fe Railway Company, The Chicago, Rock Island & Pacific Railway Company, et al. Filed July 25th, 1923. File No. 29,766.



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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA AND
Interstate Commerce Commission,
appellants,

v.

ABILENE & SOUTHERN RAILWAY Company, The Atchison, Topeka & Santa Fe Railway Company, et al., appellees.

No. 456.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

This is an appeal by the United States and the Interstate Commerce Commission from a final decree of the United States District Court for the District of Kansas,¹ perpetually enjoining the enforcement of an order made by the Interstate Commerce Commission, Division 4, in *Kansas City, Mexico & Orient Divisions*, 73 I. C. C. 319.

¹ Hon. Robert E. Lewis, Circuit Judge; Hon. J. Foster Symes and Hon. Thomas Blake Kennedy, District Judges; sitting as a special three-judge court under the provisions of the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219, 220.

The order fixed divisions of joint rates between the Kansas City, Mexico & Orient Railway Company of Texas and the Receiver of the Kansas City, Mexico & Orient Railroad Company on the one hand, and each of the thirteen railroad companies which are their direct connections on the other.

The railway line of the Kansas City, Mexico & Orient Railroad Company extends from Wichita, Kans., southwesterly across the States of Kansas and Oklahoma to the Texas state line, where it joins the railway line of the Kansas City, Mexico & Orient Railway Company of Texas, which extends from that point southwesterly to Alpine, Tex., near the Mexican border. The railroad properties of the two companies are operated as a single system of railway, called herein the "Orient." The receiver of one company is the president of the other, and the two companies have the same general officers. The system line of the Orient is 737 miles in length and represents an investment, in road and equipment, minus depreciation, of \$28,848,090.93, of which the investment in the properties of the Texas Company is \$6,878,360.62 and the investment in properties of the other company is \$21,969,730.31. (Rec.¹ p. 10, 11; Record before the Commission,¹ pp. 96, 97.)

The line of the Orient passes through a relatively undeveloped country and the density of its traffic is accordingly relatively light. Nevertheless, it han-

¹ The record of the proceedings before the Commission is a part of the record here, but is printed separately and will be referred to as the "Record before the Commission."

dles an important and considerable volume of business. In 1921 its freight revenue was \$3,449,490.83, passenger revenue \$382,041.04, mail revenue \$91,820.54, and express revenue \$60,949.19; 21,135 cars of freight originated on its line and 22,634 cars of freight were delivered to it by connections. (Record before the Commission, pp. 268, 275, 276.) In 1921 the Orient performed 185,410,508 ton-miles of transportation. The principal commodities which originate on its line are livestock, which constitutes 29.99 per cent of the total traffic originated; grain, 24.3 per cent; plaster, 12.58 per cent; and cotton, 9.04 per cent. It is estimated that an area of about 23,272 square miles with a population of approximately 500,000 is tributary to the Orient and served by it. The value of farm lands thus served is \$204,250,000.00. The road operates through 4 counties in Kansas, 8 in Oklahoma, 16 in Texas; and serves 13 county seats, of which 5 are served exclusively. In Kansas and Oklahoma there are grain elevators at all stations on its line, and in southern Oklahoma there are several cotton gins. A cement plaster mill at Hamlin, Tex., is served exclusively by the Orient. (Rec. p. 13; Record before the Commission, p. 275.)

Originally it was planned to build a line from Kansas City, Mo., to the Pacific coast at Topolobampo Bay, Mexico, a short line from the midwest to the Pacific Ocean. Construction was begun at various points in 1901-2. Certain parts of the line in Mexico have been built and are in operation, but the line as

projected has not been completed. Work on the Mexican lines was suspended in 1908 as a result of political conditions in Mexico. The Commission did not fix the divisions to be received by the Mexican lines which are in no way involved in this case. They are not owned or operated by either the Kansas City, Mexico & Orient Railroad Company or the Kansas City, Mexico & Orient Railway Company of Texas, and form no part of the Orient as that term is used here. (Rec., pp. 10, 11.)

The lines in the United States, as originally contemplated, were completed in 1913, with the exception of the line between Kansas City and Wichita which has not yet been built because it has been impossible to raise the necessary capital. (Record before the Commission, p. 100.) As various parts of the line in the United States were completed they were put into operation.

Under rates and divisions, in effect at the time of the hearing, the Orient failed to earn operating expenses by very large amounts. Eighty-four per cent of its freight revenue is derived from business interchanged with its connections and moving on joint rates. (Record before the Commission, p. 294.) For the calendar year 1920, the operating deficit was \$1,470,106.97; for the year 1921, \$860,740.81; and for the first four months of 1922, \$340,606.00. For the years 1918 and 1919, during the period of Federal control, the operation of the Orient also showed large deficits. However, during the three year period, 1915, 1916, and 1917, prior to

Federal control, the Orient earned its operating expenses and slightly more. (Rec., pp. 12, 14.)

The line of the Orient is so situated that it can be used as a part of through routes for handling east and west traffic, including transcontinental traffic, and also north and south traffic to and from Texas ports and other important points. (Record before the Commission, pp. 113-123, 280-289.)

The points of interchange between the Orient and its direct connections are as follows:

Connecting line.	Points of connection.
Missouri Pacific.....	Wichita and Anthony, Kans.
Chicago, Rock Island & Pacific.....	Wichita and Anthony, Kans., and Clinton, Okla.
Atchison, Topeka & Santa Fe.....	Wichita and Anthony, Kans.
St. Louis-San Francisco.....	Wichita, Kans., Clinton and Altus, Okla.
Midland Valley.....	Wichita, Kans.
Clinton & Oklahoma Western.....	Clinton, Okla.
Wichita Falls & Northwestern.....	Altus, Okla.
Fort Worth & Denver City.....	Chillicothe, Tex.
Missouri, Kansas & Texas of Texas.....	Hamlin, Tex.
Abilene & Southern.....	Hamlin, Tex.
Texas & Pacific.....	Sweetwater, Tex.
Gulf, Colorado & Santa Fe.....	Sweetwater and San Angelo, Tex.
Galveston, Harrisburg & San Antonio.....	Alpine, Tex.

(See the map folded in at end of this brief.)

PROCEEDINGS BEFORE THE COMMISSION.

The proceeding before the Commission which resulted in the order under attack was instituted by an order of investigation entered by the Commission on April 3, 1922, upon joint application of the Kansas City, Mexico & Orient Railway Company of Texas and the Receiver of the Kansas City, Mexico & Orient Railroad Company. (Record before the Commission, p. 3.)

The order instituting the investigation reads in part as follows (Record before the Commission, p. 63):

It is ordered, That an investigation be, and it is hereby, instituted for the purpose of inquiring into said matter, and particularly to determine whether or not the divisions of joint rates, fares, and charges on traffic interchanged between the said applicants and other carriers subject to the interstate commerce act are unjust, unreasonable, inequitable, or unduly preferential or prejudicial, within the meaning of paragraph (6) of section 15 of said act; and if so, the just, reasonable, and equitable divisions thereof that should be received by the several carriers.

All of the direct connections of the Orient, as well as certain other lines in the Southwest which do or may participate in joint rates with the Orient, were named as respondents in the order. The order of investigation required the Orient and the respondent carriers to furnish to the Commission certain information concerning the interchange traffic of the Orient. The requirement was as follows (Record before the Commission, pp. 65, 66):

It is further ordered, That said applicants, as a whole, shall file with this Commission, on or before the date of said hearing, a statement showing the number of tons and ton-miles of freight transported on their lines and interchanged with each of said respondents, moving under joint rates, for the year ended December 31, 1921; said statement to be so compiled as to show separately the number of

tons and of ton-miles of freight originating at or destined to points on the lines of said applicants and of freight as to which said applicants, as a whole, are an intermediate carrier; and in each case the revenues accruing to said applicants and, so far as practicable, the tons, ton-miles, and revenues of each of said respondents in respect of said traffic. Said statement shall further show separately the number of tons and of ton-miles of such freight received from, and the number of tons and ton-miles of such freight delivered to, each of said respondents having immediate connection with applicants' lines, at each point of interchange, and the direction of movement, whether received from or delivered to said respondents.

It is further ordered, That each respondent shall file with this Commission, on or before the date of said hearing, a statement showing the number of tons and ton-miles of freight transported on its lines, moving under joint rates and interchanged with the said applicants, for the year ended December 31, 1921; said statement to be so compiled as to show separately the tons and ton-miles of such freight, originating at or destined to points on respondents' lines and of such freight as to which said respondent is an intermediate carrier; and in each case the revenues accruing to said respondent, and, so far as practicable, the tons, ton-miles, and revenues of said applicants in respect of said traffic. Each respondent having immediate connection with applicants' lines shall further show separately the number of tons and of ton-miles of such

freight received from and delivered to said applicants at each point of interchange therewith.

The case was set for hearing and duly heard before an examiner of the Commission on May 15 and 16, 1922. The Orient introduced testimony and exhibits. Respondents, although represented by counsel, introduced no evidence, aside from furnishing the information the Commission had required them to furnish.

On August 9, 1922, the Commission, Division 4, issued its report and order. (Rec. pp. 3, 9.) It found that the divisions of interstate joint rates then accruing to the Orient were unjust, unreasonable, unduly preferential, etc., as between the Orient and its several direct connections; and ordered that divisions of the several direct connections should, for the future, not exceed certain percentages of the divisions then accruing to them, respectively, and that the Orient's divisions for the future should be increased by amounts corresponding to the reductions of the divisions of the several direct connections. The order is set forth in full below:

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 9th day of August, A. D. 1922.

No. 13668.

In the matter of divisions of joint rates, fares, and charges on traffic interchanged between

the Kansas City, Mexico & Orient Railroad Company and the Kansas City, Mexico & Orient Railway Company of Texas and their connections.

A hearing and investigation of the matters involved in this proceeding having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That on and after September 15, 1922, the divisions of interstate joint rates received by Abilene & Southern Railway Company, the Atchison, Topeka & Santa Fe Railway Company, the Chicago, Rock Island & Pacific Railway Company, the Clinton & Oklahoma Western Railway Company, Fort Worth & Denver City Railway Company, the Galveston, Harrisburg & San Antonio Railway Company, Gulf, Colorado & Santa Fe Railway Company, Midland Valley Railroad Company, Missouri, Kansas & Texas Railway Company of Texas and C. E. Schaff, receiver, Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company, the Texas & Pacific Railway Company and J. L. Lancaster and Charles L. Wallace, receivers, and the Wichita Falls & Northwestern Railway Company, hereinafter termed the connecting lines, on freight traffic interchanged with the Kansas City, Mexico & Orient Railroad Company and its receiver, and the Kansas City, Mexico & Orient Railway Company of Texas, and their successors, hereinafter termed the Orient, shall not exceed the following percent-

ages of the divisions accruing on such traffic to said connecting lines, respectively.

Abilene & Southern Railway Company.....	85 per cent.
The Atchison, Topeka & Santa Fe Railway Company.....	75 per cent.
The Chicago, Rock Island & Pacific Railway Company.....	80 per cent.
The Clinton & Oklahoma Western Railway Company.....	90 per cent.
Fort Worth & Denver City Railway Company.....	70 per cent.
The Galveston, Harrisburg & San Antonio Railway Company.....	75 per cent.
Gulf, Colorado & Santa Fe Railway Company.....	70 per cent.
Midland Valley Railroad Company.....	80 per cent.
Missouri, Kansas & Texas Railway Company of Texas, and C. E. Schaff, receiver.....	80 per cent.
Missouri Pacific Railroad Company.....	80 per cent.
St. Louis-San Francisco Railway Company.....	80 per cent.
The Texas & Pacific Railway Company and J. L. Lancaster and Charles L. Wallace, receivers.....	80 per cent.
The Wichita Falls and Northwestern Railway Company.....	75 per cent.

It is further ordered, That divisions of joint rates applicable to traffic as to which the Orient is an intermediate carrier shall be adjusted by the connecting lines on relative basis of proportions prescribed above.

It is further ordered, That the several amounts by which the divisions accruing to said connecting lines are reduced under this order shall on and after September 15, 1922, accrue to the said Orient, in addition to the divisions theretofore accruing to said Orient on such traffic.

It is further ordered, That the resulting divisions shall be reduced as far as practicable to two-figure percentages according to the rule prescribed in said report.

It is further ordered, That said connecting lines above named, according as they participate in the transportation be, and they are

hereby, notified and required to cease and desist, on and after September 15, 1922, and thereafter to abstain, from asking, demanding, collecting, or receiving divisions of said interstate joint rates with the Orient upon other bases than those above prescribed.

It is further ordered, That said connecting lines, respectively, and the Orient shall jointly report to this commission on or before September 15, 1922, the divisions established under this order, of each of said carriers with respect to freight traffic moving under interstate joint rates between each of the stations or groups of stations for which such divisions are determined; and shall thereafter jointly report the number of tons, ton-miles, and revenue with respect to such traffic actually interchanged for the period from September 15, to December 31, 1922, inclusive, and for the period from January 1 to June 30, 1923, inclusive; said reports for the periods from September 15 to December 31, 1922, inclusive, shall be rendered on or before April 1, 1923, and the reports for the period from January 1 to June 30, 1923, inclusive, shall be rendered on or before October 1, 1923.

It is further ordered, That the word "division" as herein used, shall mean the total apportionment of a joint rate, whether determined by percentages, arbitraries, or otherwise.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the commission, division 4.

[SEAL.] GEORGE B. McGINTY,
Secretary.

The report, which was made a part of the order, contained a saving clause permitting any carrier to except itself from the order, in whole or in part, by proper showing; and directed the Orient and its connections to make reports to the Commission, at specified intervals, showing the results of the application of the divisions established by the order. Jurisdiction was retained "to adjust on basis of such reports, the divisions, herein prescribed or stated, if such adjustment shall to us seem proper." (Rec. p. 19.)

PROCEEDINGS IN THE DISTRICT COURT.

On September 13, 1922, prior to the effective date of the order, the thirteen carriers whose divisions were reduced, appellees here, having made no application to the full Commission for a rehearing, or for a stay or suspension of the order of the Commission, Division 4, filed a bill against the United States in the United States District Court for the District of Kansas, seeking to have the order enjoined on the ground that it was invalid because unsupported by evidence and for other reasons which will appear later. (Rec. p. 2.) The United States filed a motion to dismiss the bill for want of equity. (Rec. p. 20.) The Interstate Commerce Commission intervened and filed a motion to dismiss, alleging that the bill was prematurely brought because plaintiffs had not exhausted their remedies before the Commission, in that they had not applied for rehearing by the full Commission, or applied to the full Commission for a stay or suspension of the order of the Commission,

Division 4. (Rec. p. 20.) The Commission also filed an answer, in which it denied that the order was unsupported by the evidence or invalid for any reason. (Rec. p. 21.) It is unnecessary to refer at length to the pleadings because they bring no facts into the case.

On October 2, 1922, after a preliminary hearing, the District Court issued a temporary injunction. (Rec. p. 25.) The case came on for final hearing on November 27, 1922. At that time the United States filed an answer. (Rec. p. 27.) At the final hearing, plaintiffs introduced in evidence a certified copy of the proceedings before the Commission. They offered no further evidence except first, certain tabulations compiled from the evidence before the Commission and purporting to show, among other things, the revenue per ton-mile¹ which the several direct connections of the Orient were receiving on business interchanged with the Orient, under divisions in effect prior to the Commission's order, and the revenue per ton-mile which they would receive on this business under the divisions prescribed by the order; and second, an order of the Railroad Commission of Texas, dated November 16, 1922, which dismissed an application of the Orient seeking increased divisions on intrastate traffic within the State of Texas. (Rec. pp. 33, 34.)

On March 19, 1922, the District Court entered orders overruling the motions to dismiss and making

¹ Revenue per ton-mile is the average revenue received for transporting one ton of freight for a distance of one mile.

its temporary injunction perpetual. (Rec. pp. 54, 55.) The court filed an opinion, Judge Kennedy dissenting, in which it, in effect, reached the conclusion that the Commission's order was not made for the purpose of fixing just divisions of joint rates, but for the purpose of sustaining the Orient by contributions from its more prosperous connections. (Rec. p. 35.) The court said that there was not sufficient evidence to support a finding concerning divisions. Judge Kennedy filed a dissenting opinion. (Rec. p. 48.) The court did not find it necessary to consider all of plaintiffs' contentions, but all such contentions were noticed and answered in the dissenting opinion.

QUESTIONS BEFORE THIS COURT.

The United States and the Interstate Commerce Commission took a direct appeal to this court, making sixteen assignments of error (Rec. pp. 68-72), which need not be set out at length.

The questions presented arise from the following contentions of appellees:

1. The question of the reasonableness of divisions was not properly before the Commission because the application of the Orient to the Commission, requesting that the Commission investigate the question of divisions, did not allege that the Orient's divisions were unreasonable.

2. The order is not really an order concerning divisions at all, but merely a method of transferring funds to the Orient from its connections. This contention was in substance sustained by the district

court. It rests, first, upon the view that the Commission, in fixing divisions, has no power to consult the relative financial needs of the carriers, a fundamental misconstruction of the statute and, second, upon a failure to give certain evidence, relating to the amount of service performed by the Orient and its several connections under joint rates, the burdens incident to performing such service, etc., the significance which it properly carries.

3. The order is beyond the power of the Commission because it increases the divisions of the Orient and reduces the divisions of the direct connections without at the same time considering and fixing the divisions of other railroad companies, parties to the joint rates.

4. The order is arbitrary because the percentages by which the divisions of the several direct connections are reduced are not uniform.

5. The order will result in the confiscation of appellees' property.

As to the point raised in our motion to dismiss, namely, the failure of appellees to apply for a rehearing by the full Commission before attempting to enjoin the order of Division 4 of the Commission, we merely wish to say that the course followed was not the "proper and orderly course," and was not in keeping with "equitable fitness and propriety." *Prentis v. Atlantic Coast Line*, 211 U. S. 210. This court should not be called upon to review orders of a division of the Commission, which the full Com-

mission has authority to rehear and reverse (Inter-state Commerce Act, Sections 16a, 17(4)), unless application has been made for such rehearing.

ARGUMENT.

I.

THE QUESTION OF THE REASONABLENESS OF DIVISIONS WAS PROPERLY BEFORE THE COMMISSION.

Appellees say that the Commission's order fixing just and reasonable divisions is void because the reasonableness of divisions was not within the issues raised by the pleadings.

This contention is based upon the assumption that the Orient filed a complaint with the Commission and that this complaint was a pleading which determined the issues. As a matter of fact, the Orient did not file a complaint but merely made written application to the Commission requesting the Commission to institute an investigation upon its own motion. This application was not a complaint in the formal sense of the word and was not a pleading. It was simply a suggestion that the Commission undertake its own investigation. This the Commission did, and entered an order of investigation to which we must look for the issues. This order, set out hereinbefore, is, in part, repeated here:

That an investigation be, and it is hereby, instituted for the purpose of inquiring into said matter, and particularly to determine whether or not the divisions of joint rates,

fares, and charges on traffic interchanged between the said applicants and other carriers subject to the interstate commerce act are unjust, unreasonable, inequitable, or unduly preferential or prejudicial, within the meaning of paragraph (6) of section 15 of said act; and if so, the just, reasonable, and equitable divisions thereof that should be received by the several carriers.

The Commission's authority to proceed upon its own initiative is found in the following language of section 15 (6):

Whenever, after full hearing upon complaint or upon its own initiative, the commission is of opinion that the divisions of joint rates, fares, or charges, * * * are or will be unjust, * * * the commission shall by order prescribe the just, * * * divisions * * *.

The Commission's right to initiate an investigation concerning the reasonableness of divisions is in no way dependent upon or limited by a complaint.

II.

THE COMMISSION, IN FIXING DIVISIONS, MAY CONSULT, IN THE PUBLIC INTEREST, THE FINANCIAL NEEDS OF THE CARRIERS AND IS NOT RESTRICTED TO A CONSIDERATION OF THE AMOUNT AND COST OF TRANSPORTATION SERVICE PERFORMED BY EACH CARRIER.

Prior to the Transportation Act, 1920 (41 Stat. 456), the Commission had certain jurisdiction over the division of joint rates.

However, that act greatly enlarged the powers of the Commission in this respect as well as in

a great many other respects. Section 15 (6) of the Interstate Commerce Act, as amended by the Transportation Act, reads as follows:

Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges applicable to the transportation of passengers or property are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers or any of them or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, * * *. In so prescribing and determining the divisions of joint rates, fares, and charges the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers, and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

The intent and meaning of this section is to be gathered not only from the language of the section but also by reference to the scope and purpose of the statute as a whole. The Transportation Act sought to maintain and foster an adequate transportation system for the people and "to preserve for the Nation substantially the whole transportation system." To accomplish this result, it was necessary to provide methods which would produce adequate revenues to satisfy the needs of the weak carriers without producing unreasonably high returns for the stronger carriers. New rights, new obligations, and new machinery were created. The so-called group system of rate making was established, and new provisions concerning divisions of joint rates were added as an integral part of the plan for distributing funds to be raised by the new rate-fixing sections.

In *New England Divisions Case*, 261 U. S. 184, this court construed the provisions of the law giving the Commission power to fix divisions and clearly pointed out the part which these provisions play in the new scheme of regulation. The court said, beginning at page 189:

It is contended that the order is void, because its purpose was not to establish divisions just, reasonable, and equitable, as between connecting carriers, but, in the public interest, to relieve the financial needs of the New England lines, so as to keep them in effective operation. The argument is that

Congress did not authorize the Commission to exercise its power to accomplish that purpose. An order, regular on its face, may, of course, be set aside if made to accomplish a purpose not authorized. Compare *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, 443. But the order here assailed is not subject to that infirmity.

Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses, particularly those arising from excessive or discriminatory rates. The 1920 Act sought to ensure also adequate transportation service. That such was its purpose Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission new powers were conferred and new duties were imposed.

The credit of the carriers, as a whole, had been seriously impaired. *To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued*

operation would be impossible, unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit to what the traffic would bear. A five per cent increase had been granted in 1914, *Five Per Cent Case*, 31 I. C. C. 351; 32 I. C. C. 325; fifteen per cent in 1917, *Fifteen Per Cent Case*, 45 I. C. C. 303; twenty-five per cent in 1918, General Order of Director General, No. 28. Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. *It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers.* To accomplish this two new devices were adopted; *the group system of rate making and the division of joint rates in the public interest.* Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. *Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections.* Thus, by marshalling the revenues, partly through capital account, *it was planned to distribute augmented earnings, largely in proportion to the carrier's needs.* This, it was hoped, would enable the whole transportation system to be

maintained, without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new-rate-fixing sections. It was, indeed, indispensable. [Italics ours.]

And at page 193:

Plaintiffs insist that Transportation Act, 1920, did not, by its amendment of Sec. 15 (6) change, or add to, the factors to be considered by the Commission in passing upon divisions; that it had, theretofore, been the Commission's practice to consider all the factors enumerated in Sec. 15 (6); that this enumeration merely put into statutory form the interpretation theretofore adopted; that the only new feature was the grant of authority to enter upon the enquiry into divisions on the Commission's initiative; that this authority was conferred in order to protect the short lines, which because of their weakness might refrain from making complaint, for fear of giving offence; and that the power conferred upon the Commission is coextensive only with the duty imposed on the carriers by Sec. 400 of Transportation Act, 1920, which declares that they shall establish "in case of joint rates * * * just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers." It is true that Sec. 12 of the Act of June 18, 1910, c. 309, 36 Stat. 539, 551, 552, which first conferred upon the Commis-

sion authority to establish or adjust divisions, did not, in terms, confer upon the Commission power to act on its own initiative. The language of the act seemed to indicate that the authority was to be exercised only when the parties failed to agree among themselves, and only in supplement to some order fixing the rates. The extent of the Commission's power was a subject of doubt; and Transportation Act, 1920, undertook by Sec. 15 (6) to remove doubts which had arisen. *But Congress had, also, the broader purpose explained above.* This is indicated, among other things, by expressions used in dealing with joint rates. By new Sec. 15 (6), page 486, *the Commission is directed to give due consideration, in determining divisions, to "the importance to the public of the transportation services of such carriers;"* just as by new Sec. 15 (3), page 485, the Commission is authorized upon its own initiative when "desirable in the public interest" to establish joint rates and "the divisions of such rates."

Second. It is contended that if the act be construed as authorizing such apportionment of a joint rate on the basis of the greater needs of particular carriers, it is unconstitutional. There is no claim that the apportionment results in confiscatory rates, nor is there in this record any basis for such a contention. The argument is that the division of a joint rate is essentially a partition of property; that the rate must be divided on the basis of the services rendered by the several carriers; that there is no difference between taking part of one's just share of a joint rate and

taking from a carrier part of the cash in its treasury; and, thus, that apportionment according to needs is a taking of property without due process. But the argument begs the question. *What is its just share? It is the amount properly apportioned out of the joint rate. That amount is to be determined, not by an agreement of the parties or by mileage. It is to be fixed by the Commission; fixed at what that board finds to be just, reasonable and equitable.* Cost of the service is one of the elements in rate making. It may be just to give the prosperous carrier a smaller proportion of the increased rate than of the original rate. Whether the rate is reasonable may depend largely upon the disposition which is to be made of the revenues derived therefrom. [Italics ours.]

In *Dayton-Goose Creek Ry. Co. v. United States et al.*, decided January 7, 1924, this court, upholding the constitutionality of the so-called "recapture" paragraphs of the Transportation Act, in explaining the new scheme of regulation established by the Transportation Act, 1920, referred to the *New England Divisions Case* as follows:

* * * In the *New England Divisions Case*, 261 U. S. 184, it was held that under Section 418 the Commission in making division of joint rates between groups of carriers might in the public interest consult the financial needs of a weaker group in order to maintain it in effective operation as part of an adequate transportation system, and give it a greater share of such rates if the share of the

other group was adequate to avoid a confiscatory result.

In *United States et al. v. Illinois Central R. R. Co. et al.*, also decided on January 7, 1924, the court again referred to the *New England Divisions Case*, saying:

In view of the policy and provisions of that statute [Transportation Act, 1920], the Commission may properly have concluded that the carrier's desire to originate traffic on its own lines, or to take traffic from a competitor, should not be given as much weight in determining the justness of a discrimination against a locality as theretofore. For now, the interest of the individual carrier must yield in many respects to the public need. *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.* 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184.

In the light of these decisions, it is manifest that the court below based its opinion upon a construction of the statute which is fundamentally erroneous. That court said:

Participating carriers in a joint service are entitled to be compensated in proportion to the amount of service and the cost of the service which they each render, and the fact that one of them is prosperous and the other not will not override the just right of each to a fairly proportionate share out of the joint earnings, whether the amount distributed to each be fully compensatory or be less to each than the value of the services so rendered. (Rec. p. 43.)

* * * * *

*Minnesota State Library
St. Paul, Minn.*

It seems to us that the inquiry was not directed to an ascertainment of the relative amount and cost of service on interchange traffic as between the Orient and the plaintiffs, and that there is no proof, including the annual reports, which will sustain a conclusion that existing divisions were unjust and inequitable at the time the order was made. The order is said to be of the blanket type. It cut through all existing divisions alike and took from each carrier a uniform per cent and added it to the Orient's share under the old divisions. A comparison of those per cents with the per centums of railway operating income disclosed that the greater the income of plaintiffs the greater the increase allowed the Orient by deductions from the more prosperous roads. This was the method of relief proposed by the Orient in its application.

The transportation act discloses no intention to vest the Commission with power to relieve the necessities of weaker lines by imposing the burden upon its connections, simply because they are able to bear it. It exhibits a contrary purpose in section 15-a, because that policy would tend to bring all carriers to the same level in earnings and there would be no necessity for loans and no fund probably could be recovered for making them.

Much stress is placed on the literal expression found in paragraph 6, section 15, as to what the Commission shall consider "in so prescribing and determining the divisions of joint rates, fares, and charges." Efficiency is an element in the cost of service, though not,

we believe, to the extent of giving a reward to inefficiency; revenue required to pay operating expenses, taxes, and a fair return is of weight in determining whether an increase in the joint rate should be allowed, and if so, whether all or what part of the increase should be given to a particular carrier, or whether there should be a decrease, and how borne; likewise, the importance to the public served, as to what the joint rate should be. But paragraph 6 is not isolated. Other parts of section 15 give the Commission power to fix joint rates. Its whole power over the subject is in contemplation in paragraph 6. There is thus a mingling in that paragraph of subject matters to be considered by the Commission on the different inquiries, some of weight in determining what the joint rates should be, in which both the public and all participating carriers are interested, and others in which the public has no concern. It is not interested as to which participant be the originating, intermediate, or delivering carrier, nor the mileage haul of each, nor how existing divisions should be divided between them, except remotely. *No one but participating carriers are interested in a redivision of existing rates. So that it seems obvious to us that the phrase in paragraph 6 so much relied upon intends that all of the subjects named for consideration have application only where the inquiry goes to the extent of both fixing and dividing the joint rates; and that where it extends only to a division of existing rates, some of the things named for consideration by the Commission have no relevancy to or weight in*

determining what the new divisions shall be. In such an investigation we think the controlling inquiry must necessarily be directed to ascertaining the amount and cost of service to each of them. * * * (Rec. pp. 46, 47.) (Italics ours.)

The facts, stated hereinbefore, show that the Orient is an important carrier. The Commission stated in its report (Rec. p. 14):

In our original report on the application of the Orient under section 210 of the Transportation Act, 1920, Finance Docket No. 3, we said:

"It is not disputed that the Orient System, or at least that part which lies within the United States, is of essential importance in meeting the transportation needs of the public in the territory which it serves."

Nothing appears of record in the present case to justify any different conclusion.

In *Increased Rates, 1920, Ex parte 74*, 58 I. C. C. 220, the Commission, pursuant to the provisions of the law concerning group rate making, authorized rates, in designated rate groups, designed to yield, as nearly as might be, a return of 6 per cent upon the aggregate value of the railway properties in the United States. An increase of 35 per cent was permitted in the rates in the western rate group. In determining the amount of this increase the value of the railway properties of the Orient was considered as well as the value of properties of all other carriers in the group. The financial results of the operations

of the Orient were also considered in determining the additional revenue needed to produce the requisite return. An increase of $33\frac{1}{3}$ per cent in the rates applicable to traffic moving from a point in one rate group to a point in another rate group was also authorized. The Orient lies in the western group, so that traffic in which it participates moves either wholly within that group or between ~~two~~ groups. Under the level of rates so authorized by the Commission, and the divisions of joint rates which it received, the Orient not only failed to earn a fair return on the value of its properties, but failed to earn sufficient revenue to pay its operating expenses. On the other hand, the several appellees earned operating expenses and, in addition, earned returns upon their respective investments, as shown by their reports to the Commission, ranging, for 1921, from 12.13 per cent for the Fort Worth & Denver City, 10.73 per cent for the Gulf, Colorado & Santa Fe, 6.27 per cent for the Atchison, Topeka & Santa Fe, to 2.71 per cent for the Missouri Pacific and 1.39 per cent for the Clinton & Oklahoma Western. (Rec. 16.)

These are matters properly to be considered by the Commission. But the order was not based solely upon such considerations; there was other evidence to support it relating to strictly transportation considerations, which will be discussed later.

III.

THERE WAS SUFFICIENT EVIDENCE BEFORE THE COMMISSION TO SUPPORT ITS ORDER.

Appellees' contention, and the conclusion of the lower court, that there was no evidence to support the Commission's order are inextricably interwoven with, and dependent upon, the mistaken view of the statute, discussed hereinbefore, that the Commission was without power to consider the financial needs of the carriers in the interest of the public and for the purpose of preserving an important part of the transportation system. This view leads appellees to think that all evidence bearing on this phase of the case which has been discussed already, was in fact no evidence at all. Not only, however, must this evidence be ignored, before there is any foundation for appellees' claim, other evidence of an entirely different character must also be disregarded. We will now discuss this other evidence and examine the reasons which are relied upon to explain it away.

1. The fact that the Commission considered certain information shown in the annual reports made by appellees to the Commission, which were not formally introduced in evidence, does not invalidate its order.

Before discussing the sufficiency of the evidence, a preliminary question should be disposed of. Appellees say that the order is based, in part, upon facts which were not properly before the Commission. They refer to the table which appears in the Commis-

sion's report showing, among other things, certain unit revenues and unit expenses of the Orient and the several appellees. (Rec. p. 16.) This table was compiled from information shown in the annual reports, for the year 1921, made to the Commission by the carriers.

During the early part of the hearing, the examiner announced that the Commission would refer to these reports in its consideration of the case. The language of the examiner, as reported, is somewhat confusing, but the record makes his meaning perfectly plain and leaves no doubt that his statement was well understood at the time. The following is quoted from the record before the Commission, pages 73, 74:

Examiner BURNSIDE. I have no doubt it will be necessary to refer to the annual reports of all these carriers. Will it be understood at the outset that these reports may be referred to?

Mr. WOOD [Counsel for certain respondents]: If anything from the annual reports is to be considered in the case, it should be formally a part of the record by abstract or extract therefrom.

Mr. BOYD [Counsel for the Orient]: I only request that the Commission consider in evidence the reports on file of the respondents and of the carriers, and while they would be available to us if we were to spend a great sum of money coming up here and getting the transcript of them, they are easily available to the Examiners and to the Commission.

Examiner BURNSIDE. The rules of practice of the Commission now effective, I think, provide that the annual reports may be used in evidence, and the requirement is that all matter which may be pertinent or which may be used in the case, be reproduced and furnished in exhibits; but that would be quite a burden, and I feel constrained to proceed under the rule of the Commission.

Mr. Wood. The reporter will kindly note an exception on the part of the respondents to the consideration by the Commission of any matter in this case that is not formally incorporated in the record and made a part thereof and the contents of which are made the subject of cross-examination.

Examiner BURNSIDE. The exception will be noted.

Rule XIII of the Commission's Rules of Practice, in effect at the time of the hearing, provided, in part, as follows:

(b) In case any portion of a tariff, report, circular, or other document on file with the Commission is offered in evidence, the party offering the same must give specific reference to the items or pages and lines thereof to be considered. The Commission will take notice of items in tariffs and annual or other periodical reports of carriers properly on file with it or in annual, statistical, and other official reports of the Commission. When it is desired to direct the Commission's attention to such tariffs or reports upon hearing or in briefs or argument it must be done with the precision specified in the second preceding sentence.

What the Commission did was not in violation of this rule. The first and third sentences of the rule prescribed the course which litigants must follow. The first simply indicates that if such a portion of such a document is offered in evidence the specific reference must be made, which is perfectly natural. The third makes it clear that a litigant desiring to direct the Commission's attention to a tariff or report on file with it or to a report of the Commission (and this is not confined to a report introduced in evidence), specific reference shall be made to the part to be considered, and this too is perfectly natural. This sentence also makes it clear that the litigant may make such a reference in brief or argument even though such reference is not made in the hearing, and this is consistent with the second sentence which is discussed below. Both the first and third sentences are obviously directions to litigants, based on plain dictates of convenience.

The second sentence simply gives notice to litigants that the Commission, without qualification or limitation, reserves, and proposes to use, its obvious right to take notice of the tariffs and reports on file with it and of its own reports whether introduced in evidence or not, and this is sound and proper.

If the Commission did not have this right, it would be even more restricted than are the courts, which take judicial notice of the official reports of the Commission and of other governmental agencies. The rule of the Commission should be more liberal rather than less liberal than that of the courts. The

second sentence merely states a rule eminently reasonable and certainly not too liberal for the Commission's practical necessities.

Certainly the carriers were not subjected to injustice. The matters for which the Commission referred to the annual reports were identified with the precise subject matter to which the case was devoted, and the carriers were also put on express notice of the intention to look at their own reports.

It certainly would have been entirely in order for the Commission physically to incorporate into the record in this case copies of the annual reports of each of the carriers, and in that event these carriers would not have had the right to insist that specifications be made at the hearing of the particular figures which the commission would consider. What was done was the equivalent of this and avoided a useless expense.

The commission is not bound by strict and technical rules of evidence such as prevail in the law courts. In *Interstate Comm. Com. v. Baird*, 194 U. S. 25, 44, the court stated:

The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof.

In *Interstate Commerce Commission v. Louisville & Nashville R. R.*, 227 U. S. 88, the court stated at page 93 that—

The commission is an administrative body and, even when it acts in a quasi-judicial capacity, is not limited by strict rules as to the admissibility of evidence, which prevail in suits between private parties.

The court then pointed out that it was, of course, necessary for the commission to preserve the essential rules of evidence by which rights are asserted or defended. In *Spiller v. Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, at page 131, the court cited the *Baird case, supra*, and the *Louisville & Nashville case, supra*, in support of the proposition that the commission should not be bound down "too closely in respect to the character of the evidence it may receive or the manner in which its hearings shall be conducted."

There can be no doubt that the procedure before the Commission, in connection with the introduction of evidence, as well as in all other respects, must be such as to preserve the substantial rights of litigants. The question is then, were appellees prejudiced by the consideration of their annual reports? These reports were filed with the Commission by them in compliance with a statutory requirement and were sworn to by responsible officers of the companies. The books and accounts of the carriers, which form the basis of the figures shown in their annual reports, are kept in accordance with a uniform system of

accounting prescribed by the Commission. To falsify a carrier's records is a misdemeanor punishable by heavy fines and imprisonment. These figures, therefore, have every guaranty of trustworthiness. Furthermore, no effort was made to deny their accuracy. Appellees had full knowledge of all information contained in their respective annual reports; they had notice that such reports would be considered, the reports are public records and were available to them, but they offered no evidence, made no attempt to refute or explain at the hearing, and did not seek a rehearing for this purpose. It seems manifest that no substantial right of plaintiffs was infringed.

In *Int. Comm. Com. v. Chi., R. I. & Pac. Ry.*, 218 U. S. 88, it appeared that the Commission had referred to the reports of the carriers, although apparently no point was made of it. The court not only upheld the Commission's order but referred with seeming approval to the course which had been followed. Summarizing the answer of the Commission, the court stated on page 98:

Supplementing this the Commission sets forth that on the hearing before it oral and documentary evidence was taken, to which it gave full consideration, *and to the reports filed by the companies with it in accordance with the statute.* [Italics ours.]

Discussing the powers of the Commission, the court said, at page 102:

These, we repeat, are great powers and means of their proper exercise are conferred.

Investigation may be conducted, and as the Commission says in its answer, "that to enable it to perform its duties such information as shows the operations and operating results of each railway is" required to be filed with it and the subject is under constant investigation.

We desire to call attention to the discussion of this feature of the case in Judge Kennedy's dissenting opinion, beginning with the last paragraph on page 49 of the record.

2. The Evidence showed, for the period of a year, the amount of service jointly performed by the Orient and each of its connections, and the part of such service performed by each; the joint revenue arising from the joint service and how it was divided.

The leading objection to the evidence is that it does not include tariffs showing individual joint rates, or division sheets showing how these individual joint rates are divided. Appellees say that, in the absence of such evidence, the Commission did not know what the existing divisions were and was not in a position to judge whether they were reasonable, or to fix reasonable divisions for the future. It is also objected that the record does not show what service was performed under each individual rate and what part of such service was performed by each line.

The nature of the proceeding before the Commission, and the character of the order, must determine the kind of evidence necessary to support the order.

We must keep in mind what the Commission did. It considered and treated separately each direct connection of the Orient, and the divisions of joint rates between each such connection and the Orient. But it did not make a separate adjudication in respect of each division of each rate. As between the Orient and each connection, blanket treatment was given to all divisions of all joint rates; the matter was dealt with comprehensively. The power of the Commission to deal with a divisions case, as with a rate case, in this manner cannot be denied. The blanket method of treatment was explained at length, and approved, in *New England Divisions Case*, 261 U. S. 184, 196-199. The order of the Commission there sustained was, like the order in this case, a so-called blanket order which did not deal with the divisions of particular rates, as such. It provided that the New England railroads should receive a blanket increase, approximately 15 per cent, in respect to all divisions of all joint class rates and of all commodity rates dividing on the same bases, and that the lines west of the Hudson River should accept corresponding reductions of their divisions. The court said, page 197:

Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed six hundred; the number of rates involved, many millions. The weak

roads were many. The need to be met was urgent. To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. We must assume that Congress knew this; and that it knew also that the Commission had been confronted with similar situations in the past and how it had dealt with them.

The court pointed out that for many years before the enactment of the group rate making provisions of the Transportation Act, 1920, it had been necessary, from time to time, "to adjudicate comprehensively upon substantially all rates in a large territory;" and that the Commission had made such rate changes "by a single order, and in a large part, upon evidence deemed typical of the whole rate structure." The court continued, page 198:

It was the actual necessities of procedure and administration which had led to the adoption of that method in passing upon the reasonableness of proposed rate increases. The necessity of adopting a similar course when multitudes of divisions were to be passed upon was obvious. The method was equally appropriate in such inquiries; and we must assume that Congress intended to confer upon the Commission power to pursue it.

In speaking of the power of Congress in this respect, the court stated, page 199:

That there is no constitutional obstacle to the adoption of the method pursued is clear.

Congress may, consistently with the due-process clause, create rebuttable presumptions, * * * and shift the burden of proof * * *. It might, therefore, have declared in terms, that if the Commission finds that evidence introduced is typical of traffic and operating conditions, and of the joint rates and divisions, of the carriers of a group, it may be accepted as *prima facie* evidence bearing upon the proper divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions. For only in that way could the task be performed.

In the case at bar, the Commission did not have before it large numbers of individual rates or information showing how individual rates were divided, and did not have information showing the amount of service which the Orient and each of its connections performed in respect of transportation under such individual rates. What purpose would such information serve in a case of this kind? Only this: If a sufficient number of individual rates and individual divisions were shown, together with information concerning the transportation performed under such rates, a basis would be furnished upon which the Commission could reach a conclusion as to whether or not the divisions, taken as a whole, were equitable and just as between the Orient and each of its connections. That is the important and ultimate fact such information would tend to show. If the record

contains other evidence upon which the Commission can form a judgment concerning this fact, there is clearly no necessity that it should include also information concerning individual rates and divisions. And the record does contain such other evidence.

We refer to exhibits 25 and 26. (Record before the Commission, pp. 326, 327.) The same information is also shown, in slightly different form and with some elaboration, in exhibits 27-41. (Record before the Commission, pp. 328-375.) These exhibits show, for the year 1921, the volume of traffic moving on joint rates and interchanged between the Orient and each of its direct connections; the part of the joint service performed by the Orient and the part performed by its connection; the revenue arising from the joint service, and how that revenue was divided. For example: Such exhibits show that, during 1921, the Santa Fe and the Orient interchanged 26,278 tons of freight; that with respect to such freight the Orient performed 8,162,294 ton-miles of transportation and the Santa Fe 5,793,098 ton-miles; that the revenue arising from this joint service was \$218,827.71 of which the Orient received \$106,889.59 and the Santa Fe \$111,938.12; that the per ton-mile revenue of the Orient was 1.310 cents and the per ton-mile revenue of the Santa Fe 1.932 cents. Like information is shown as to the business interchanged on joint rates between the Orient and each of its connections.

This was better evidence of how the joint rates divided, as a whole, than any number of individual rates and divisions, short of every such rate and

division, would have been. See the dissenting opinion on this point. (Rec. 52.)

Evidence "deemed typical of the whole rate structure" will support a finding, in a general rate case, as to each rate in that structure, by raising a rebuttable presumption concerning each rate. A like presumption arises from similar evidence in a divisions case. "Typical" evidence in this sense does not mean evidence directly representative of every individual rate; it means evidence tending to show the general situation. It is the conclusion, thus reached, as to the whole structure of rates, from which the presumption directly arises concerning individual rates, as to which there has been no special showing. Therefore, the evidence which has been described, and the evidence which will be later referred to, bearing upon the reasonableness of the divisions between the Orient and each of its connections, as a whole, is sufficient to enable the Commission to make a finding as to each division of each rate.

In this case the Commission came much nearer to specific treatment than in the *New England Divisions Case* because here it dealt separately with each connection and considered, as between it and the Orient, the relative aggregate services and revenues therefrom and the relative average revenues per ton-mile. In the *New England Divisions Case* a much more sweeping treatment was sustained. There not only were all class rates and commodity rates which divided on the same bases treated alike, but all car-

riers east of the Hudson River were treated alike, as were all carriers west of the river.

In the blanket or general treatment of the divisions of all joint rates between two carriers, or in the blanket treatment of rates themselves, there is always a possibility that in special and exceptional cases certain rates or divisions will result which are unjust or unreasonable. The Commission recognized this possibility and made adequate provision for it, clearly indicating its willingness and desire to correct injustices which might be found to arise in connection with the comprehensive manner in which the Commission decided it was necessary to deal with the subject. (See page 12 of this brief.) Such a course was approved by this court in *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 579; and in *New England Divisions Case*, 261 U. S. 184, 199. The Commission retained jurisdiction of the case for the express purpose of making such modifications of its order as might appear desirable from reports reflecting the actual results of the application of the divisions prescribed, which the Commission required the respondents to make from time to time.

3. The evidence shows that costs of operation on the line of the Orient are relatively high as compared with such costs on the lines of its connections.

The Orient has a light traffic density which naturally makes for high operating expenses. This is reflected in the operating ratios¹ for the year 1921 of

¹ The operating ratio is the percentage of revenue represented by operating expenses.

the Orient and its several connections which, as calculated from the figures shown in the Commission's report (Rec. p. 16), are set out below:

Orient	111.60
Abilene & Southern.....	69.44
Atchison, Topeka & Santa Fe.....	69.12
Chicago, Rock Island & Pacific.....	81.36
Clinton, Oklahoma & Western.....	82.30
Fort Worth & Denver City.....	66.27
Galveston, Harrisburg & San Antonio.....	87.35
Gulf, Colorado & Santa Fe.....	73.18
Midland Valley.....	76.35
Missouri, Kansas & Texas Ry. of Texas.....	80.12
Missouri Pacific.....	83.53
St. Louis-San Francisco.....	73.52
Texas & Pacific.....	84.66
Wichita Falls & Northwestern.....	66.59

The table in the Commission's report (Rec. p. 16) shows the operating expenses per equated ton-mile,² per car-mile, and per train-mile on the entire volume of business handled by the Orient and each of its connections. These figures indicate that transportation can not be performed on the line of the Orient as economically as it can be performed on the lines of its connections, with the exception of certain short lines such as the Abilene & Southern and the Clinton, Oklahoma & Western, which obtain short hauls and correspondingly high unit revenues, as is shown by the table.

In speaking of the significance of figures shown in the table in the Commission's report, Judge Kennedy stated in his dissenting opinion (Rec. p. 54):

² An "equated ton-mile" is a transportation unit derived by adding to the ton-miles of freight three times the number of passenger miles. In other words, passenger miles are "equated" into ton-miles on the basis of three ton-miles to one passenger mile.

The compilation therefore as referred to might not be conclusive, independent of all other evidence, as proving the unfairness of the joint rates to the Orient and yet itself an element which the Commission had the right to take into consideration; and in fact, it may be the best available method of securing in its larger sense a reflection of the fairness of a division of joint rates among carriers. This compilation shows generally a greater net revenue, in relation to operating expense, to plaintiff carriers than to the Orient.

As a further indication of high operating costs on the Orient, it appears that the Orient is subject to unusual expenses. There is no coal on its line and no timber suitable for ties. Accordingly fuel and ties are necessarily bought at points on foreign lines and the Orient is obliged to pay the costs of transportation to its line. As the result of the increases in freight rates since 1917, the transportation charges on coal and ties which the Orient used in 1921 were \$98,000 more than they would have been if the 1917 rates had been in effect. (Rec. p. 13; Record before the Commission, pp. 87, 273.) It is common knowledge that for the past few years extremely high prices for labor and materials have prevailed. This would naturally affect a carrier whose traffic is light more injuriously than a carrier with a greater traffic density.

The fact that the Orient failed to earn operating expenses in 1917 by only \$45,600, and actually earned slightly more than its operating expenses for

the three-year period ending December 31, 1917, whereas it showed enormous operating deficits for the years 1920, 1921, and up to the time of the hearing (Rec. p. 12), indicates how burdensome to it were these conditions which came about after Federal control as result of high prices of labor and material. The very unfavorable results in 1920 and 1921, as compared with 1917, are not to be explained by a falling off of traffic, for apparently traffic increased, as the following figures show: (Rec. p. 13.)

Year.	Revenue freight originating on road.	Revenue freight from con- necting carriers.	Total revenue carried, freight.
1917.....	Tons. 336,393	Tons. 831,128	Tons. 1,187,721
1918.....	277,123	880,423	1,157,546
1919.....	285,143	917,492	1,312,635
1920.....	321,807	904,986	1,426,793
1921.....	471,324	910,430	1,381,754

Livestock, grain, and cotton are among the principal commodities which originate on the Orient and are interchanged by it with its connections. Grain constitutes 25.11 per cent of all such traffic, livestock 23.59 per cent, and cotton 9.49 per cent. The movement of livestock involves a 100 per cent empty haul and also an expensive bedding service which is performed by the Orient; the movement of grain involves long empty hauls, and in addition the Orient, as originating carrier, bears considerable expense in coopering cars; the cotton movement also involves burdensome empty hauls and demands an expensive compression service on the line of the Orient. (Record before the Commission, pp. 84-87.)

4. The Commission's finding did not rest solely upon evidence relating to the financial needs of the Orient and its several connections; the evidence relating strictly to transportation matters tended to show that the Orient's divisions were unjust.

From what has been said it appears that the Commission's finding was supported not only by evidence of the relative financial needs of the Orient and its connections, but also by a consideration of strictly transportation matters. The record showed the volume of traffic interchanged between the Orient and its several connections, the amount of service each performed as to such business, the revenue accruing for the joint service, and how that revenue was divided. The evidence also tended to show that transportation could not be performed as economically on the line of the Orient as on the lines of its direct connections, and that, in the light of the relative services performed, the existing divisions did not properly reflect the relative burdens borne by the connecting carriers. In this connection it is interesting to observe that the average per ton-mile revenue of the Orient on its interchange business was 1.47 cents and its operating expense per equated ton-mile on all business was 1.99 cents; whereas the average per ton-mile revenue for the Orient's immediate connections, on business interchanged with the Orient, was 1.185 cents, and the operating expense per equated ton-mile of these connections, on all business, was 1.144 cents. The figures are for the average figures for all connections, taken together. The figures for each

connection separately are shown on page 33 of the record.

We make no claim, of course, that the Commission had before it figures from which it could reach its conclusion by the simple application of a mathematical formula based upon unit revenues, unit costs, operating ratios, etc. It has always been recognized that rates could not be fixed by formula, and this is true also of fixing divisions. The exercise of judgment and discretion in the consideration of the many pertinent factors and elements is called into play. If it were necessary to ascertain exactly the cost of a transportation service before a reasonable rate could be fixed, the Commission's hands would be tied.

In considering whether there is evidence which will support the order, it should be remembered:

1. Although appellees were served with a notice of the hearing before the Commission and were there represented by counsel, they offered no evidence. Furthermore, with the opportunity to apply to the full Commission for rehearing and to make a showing of facts in the light of the action of Division 4, they decided not to do so. Under these circumstances the evidence is entitled to every significance which it reasonably carries.

2. The court "will not examine the facts further than to determine whether there was substantial evidence to sustain the order." *Int. Comm. Comm. v. Union Pacific R. R.*, 222 U. S. 541. *New England Divisions Case*, 261 U. S. 184, 204. It will not weigh the evidence for the purpose of determining whether

it would have reached the same conclusion which the Commission reached.

3. The Commission is an expert body, informed by experience in matters of rates and railroad statistics. Its findings are fortified by presumptions of truth. In *O'Keefe, Receiver, v. United States*, 240 U. S. 294, at page 303, it was stated:

It is said there was no evidence to enable the commission to fix a just compensation to that line for a haul of a given number of miles as compared with the just compensation for a haul of a greater or lesser number of miles; no evidence as to terminal expenses, or cost of road haul, or the relation between these factors, or as to other elements which should be taken into account in fixing a division according to the length of haul. But the evidence showed that some limitation was called for, and, in general at least, furnished the materials upon which to base it. A tribunal such as the Interstate Commerce Commission, expert in matters of rate regulation, may be presumed to be able to draw inferences that are not obvious to others.

In *Interstate Comm. Com. v. Chi., R. I. & Pac. Ry.*, 218 U. S. 88, at 110, it was said:

One question remains for discussion, the finding of the commission upon the character of the rate, whether it is unreasonable as decided. Such decision, we have said with tiresome repetition, is peculiarly the province of the commission to make, and that its findings are fortified by presumptions of truth, "due to

the judgments of a tribunal appointed by law and informed by experience." *Illinois Central Railroad Company v. Interstate Commerce Commission*, 206 U. S. 454, and cases cited. The testimony in this case does not shake the strength of such presumptions.

In Minnesota Rate case, 230 U. S. 352, at 419, the court stated:

The dominating purpose of the statute was to secure conformity to the prescribed standard through the examination and appreciation of the complex factors of transportation by a body created for that purpose.

Therefore, even if financial needs could be ignored, the court would not substitute its judgment for the Commission's judgment, and say that transportation conditions showed that the Orient's divisions were as high as they ought to be; and certainly it can not be said that there was no substantial evidence before the Commission bearing on that question. It must be remembered that the Commission's function was to determine *comparative* reasonableness of divisions as between the Orient and its respective connections. Substantial evidence was before the Commission bearing on the comparative quantities of service performed in handling the joint traffic; upon the comparative revenue therefor; and upon the comparative cost of handling all traffic. Such transportation factors furnished a substantial basis upon which the Commission "expert in matters of rate regulation," and "informed by experience" could base a valid judgment as to the comparative reasonableness of

the divisions from a transportation standpoint, even apart from the respective financial needs of the carriers.

IV.

THE COMMISSION'S ACTION IN FIXING DIVISIONS BETWEEN THE ORIENT AND ITS DIRECT CONNECTIONS WITHOUT AT THE SAME TIME READJUSTING THE DIVISIONS OF OTHER CARRIERS PARTIES TO THE RATES WAS WITHIN ITS STATUTORY AUTHORITY.

Appellees take the position that the Commission's order is void because it fixes divisions between the Orient and its direct connections without at the same time fixing the divisions to be received by other railroad companies participating in the joint rates, or without dividing the rate between the Orient, on the one hand, and all other carriers participating in it, on the other.

A large part of the interchange traffic did not move beyond the direct connections and no railroads other than the Orient and its direct connections were parties to the rates applicable to this traffic. (Record before the Commission, pp. 332 to 339, Exhibits 30 to 35; pp. 368 to 375, Exhibits 40 and 41.) As to joint rates which extended beyond the lines of the Orient and its direct connections—that is to say, joint rates in which other railroads participated—the Commission did not change the divisions received by the other carriers, but considered and reapportioned only that part of the revenue which accrued jointly to the Orient and each of its direct connections for the part of the service which they jointly performed.

In *New England Divisions Case*, 261 U. S. 184, it was held that the Commission had authority to divide joint rates on the Hudson River, that is, to fix the amount of the divisions to be received by the carriers east of the river, taken together, and the amount of the divisions to be received by the carriers west of the river, taken together, without at the same time undertaking the unworkable task of fixing the particular divisions to be received by each of the lines East of the Hudson and each of the lines West of the Hudson. In that case the court said, page 201:

It is contended that the order is void because it confines itself to dealing with the main, or primary, divisions of the joint rates at the Hudson River and fails to prescribe the subdivisions of that part of the rate which goes to the several carriers. The argument is, that if the Commission acts at all in apportioning the joint rate, its action is invalid unless it prescribes the proportion to be received by each of the connecting carriers. For this contention there is no warrant either in the language of the act, the practice of the carriers, or in reason. *The duty imposed upon the Commission does not extend beyond the need for its action.* If the real controversy is merely how much of the joint rate shall go to the carriers east of the Hudson and how much to the carriers west, there is nothing in the law which prevents the Commission from letting the parties east of the river, and likewise those west of it, apportion their respective shares among themselves.

And so here, the Commission was certainly not required by the statute to delay the decision of the question before it, i. e., the proper apportionment of the joint revenue accruing to the Orient and its immediate connections, until it could prepare itself to decide questions which it was not undertaking to decide in this proceeding.

The statute must be given a practical interpretation in the light of actual situations which arise under it; to construe it otherwise would be to completely block its remedial purpose. The magnitude of the task which would confront the Commission, and the impracticability of performing it in the ordinary divisions case, if it could not fix divisions between the Orient and its direct connections without at the same time fixing the divisions of all other carriers participating in the rates, will be readily understood when it is remembered that the Orient, like all important carriers, is a party to joint rates which run from coast to coast, and which are, or may be, participated in by every railroad in the United States, with perhaps some exceptions. If the Commission can not divide, between two connecting carriers, that part of a rate which accrues to them jointly, but must divide the entire rate, the enormous scope of the investigation necessary to obtain even typical evidence of conditions, financial, operating, and otherwise, existing on all lines which will be affected by the order, is obvious. It would preclude action except in a few cases of sufficient magnitude to justify the great expense.

The Commission's action in this case was much more specific than in the *New England Divisions Case*; here the connections were separately considered and treated. In such a case it would be a practical impossibility to obtain evidence, appropriate in character and sufficient in amount, to justify a finding as to all carriers participating in the joint rates.

If the direct connections feel that their divisions are unfair as compared with divisions of other carriers participating in the joint rates, whose divisions were not considered in this case, there is nothing to prevent them from readjusting such divisions by negotiation or, if they are unable to do that, from bringing the question before the Commission.

V.

THE ORDER IS NOT ARBITRARY BECAUSE THE DIVISIONS OF CERTAIN APPELLEES WERE DECREASED BY GREATER PERCENTAGES THAN THE DIVISIONS OF OTHERS.

Appellees object to the course followed by the Commission in giving separate consideration to, and reaching different conclusions concerning, the several direct connections of the Orient, because, in their opinion, it will interfere with the competitive situation now existing between connections in respect of business interchanged with the Orient. For an answer it is only necessary to point to the following language in the Commission's report, which is made a part of its order (Rec. p. 19);

Carriers for which rates of reduction of divisions are prescribed lower than are pre-

scribed for their competitors on competitive business to or from the Orient may voluntarily meet the greater reduction in divisions prescribed for their competitors.

It will be recalled that in *New England Divisions Case* the carriers west of the Hudson complained because varying percentages of decreases were *not* applied to the different carriers. Clearly the question of making or not making varying percentages, that is, the question of the extent of the blanket treatment, is within the sound discretion of the Commission and to be determined in the light of the practical possibilities and necessities of each particular case. It is conceivable that an order of the Commission might be attacked on the ground that it exceeded the necessities of the case in the way of blanket treatment, but it is difficult to understand how an order, based on a proper showing of facts, would be subject to criticism on the ground that it was too specific.

VI.

THERE IS NO SHOWING THAT THE COMMISSION'S ORDER WILL RESULT IN CONFISCATION.

Appellees claim that the Commission's order is invalid because it will result in confiscation. The contentions which were relied upon in the lower court and which presumably will be urged here may be summarized as follows:

1. Certain appellees, whose divisions of joint rates are reduced by the order, were at the time of the order earning, on all business, a return of less than

five and three-quarters per cent upon the value of their respective railway properties.

2. The divisions prescribed by the Commission, applied to present rates, are noncompensatory to some of the appellees.

There is one answer which goes to both contentions. The Commission, in dividing a joint rate, does not thereby fix the compensation of the individual carriers. The amount of such compensation depends not only upon the way the rate is divided but upon the amount of the rate. Until the Commission has refused to permit the rate to be increased, no question of confiscation would arise. When the Commission fairly and equitably divides a joint rate between the participating carriers, its action is not open to objection because the revenue accruing to a particular carrier is not sufficiently high to yield a fair return. If this were not true, the Commission would have no power to divide a noncompensatory joint rate. So long as carriers continue to participate in a joint rate which is not sufficiently high to yield a fair return to all carriers engaged in the joint service, they cannot be heard to complain if the Commission reapportions the revenue so as to bring about a more equitable adjustment, even if the result should be to diminish the amount of loss theretofore sustained by one of the carriers by imposing some loss upon another. If some of the rates are too low the carriers have a right to raise them to a reasonable basis.

The contention concerning the failure of certain of appellees to earn a return of five and three-quarters per cent seems to be based upon the thought that Section 15a guarantees to each carrier a return of five and three-quarters per cent. But Section 15a merely directs the Commission to establish rates which will yield "as nearly as may be" to the carriers as a whole, or in rate groups designated by the Commission, a fair return, now fixed at five and three-quarters per cent, on the aggregate value of their railway properties. The provision applies only to "carriers as a whole" or "in rate groups" and in no sense guarantees to each individual carrier a return of five and three-quarters per cent.

On the facts, there is no proof at all tending to support the claim of confiscation, whereas, to establish confiscation, clear, convincing and unmistakable proof is necessary.

In *Knoxville v. Water Co.*, 212 U. S. 1, the court, discussing the proof of confiscation required, quoted with approval the following language from *Ex parte Young*, 209 U. S. 123:

* * * no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the Federal courts.

The court continued in the *Knoxville case* as follows:

The same thought, in effect, was expressed in *San Diego Land & Town Company v. National City*, 174 U. S. 739, 754, "judicial interference should never occur unless the case

presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use." And in *San Diego Land & Town Company v. Jasper*, 189 U. S. 439, after repeating with approval this language, it was said (p. 441): "In a case like this we do not feel bound to re-examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. *It is enough if we can not say that it was impossible for a fair-minded board to come to the result which was reached.*" (Italics ours.)

Appellees produced no evidence whatever before the court to prove confiscation. It has never been the practice to set aside as confiscatory rates made by a commission except in cases where full and convincing proof has been offered to the court, directed to the specific rates which the commission has prescribed. It would be an extraordinary extension, or rather reversal, of the policy of the courts toward commission-made rates for a court, in the absence of the introduction of any proof at all, to infer confiscation merely from the evidence which had been presented to the Commission, unless, of course, the specific issue of confiscation had been fully covered in the presentation to the Commission. But the record before the Commission shows that the issue was not covered in the presentation to

the Commission. There also appellees failed to offer any proof whatever and failed also to avail themselves of a further opportunity to offer proof by asking the Commission as a whole to reconsider the action of Division 4.

If it be said that the record shows that in certain instances the ton-mile revenue which certain appellees will receive *on the specific freight traffic handled* will be less than their operating costs per equated ton-mile *on their entire freight and passenger traffic handled*, the answer is that a confiscation case could not possibly stand on any such proof alone. The presumption relative to the validity of the Commission's action could not be thus overcome; there would be too many missing links.

If then it be said such a result proves that the Commission had no right to consider the relative equated ton-mile costs on all traffic on the Orient and on its respective connections as bearing on the comparative reasonableness of the divisions to the Orient and its connections, the answer is that such a subquestion confuses two fundamentally different subject matters. The suggestion is equivalent to saying that no evidence is sufficient to sustain a finding as to reasonableness of divisions unless it is so full, complete, and specific as to supply a definitive answer to the question of confiscation if that question be subsequently raised. The suggestion ignores the well-established distinction that any substantial evidence, which would justly appeal to an expert rate-making tribunal, will sustain an order of the Com-

mission; while only complete and convincing evidence, negativing all reasonable doubts, is sufficient to justify a court in overthrowing an order of the Commission as confiscatory. Such suggestion overlooks the distinction between that evidence which supplemented by presumptions in favor of a commission's order will sustain that order, and evidence which will overcome all presumptions in favor of a commission's order and show the order to be confiscatory.

This further thought deserves consideration: The traffic moving between the Orient and points on appellees' lines is important to the public. That traffic should continue to move. It is desirable that the joint rate should pay the joint costs, and if possible a fair return as well. If the rate is not sufficiently high to do this, the matter may be presented to the Commission to see whether the joint rate may be raised. But unless and until that is done, is there any reason why the burden of transportation at less than full pro rata cost should fall on the Orient rather than on its connections? Is it more in the public interest that it should sustain losses of this character than that they should do so? Is not such a broad question of comparative burden precisely such a question as is submitted to the discretion of the Commission by section 15 (6)? The evidence before the Commission threw substantial light on the question of comparative reasonableness. Certainly it did not even approach a showing of confiscation in the constitutional sense, even if the

court were to look solely at the interests of the Orient's connections and disregard entirely the status of the Orient.

CONCLUSION.

We submit that a careful review of the proceedings before the Commission shows that the Commission made a reasonable investigation "which * * * fitted the subject to be investigated"; that it dealt with the question before it in a rational, practical fashion; that its order will work substantial justice and is safeguarded in every possible manner to avoid minor incidental injustices and to provide remedies by which such injustices, if any should develop, can be remedied.

In *Interstate Comm. Com. v. Chi., R. I. & Pac. Ry.*, 218 U. S. 88, it was said, at page 103:

The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it, therefore, are complex and difficult, the means of solving them are as great and adequate as can be provided. And arguments which point out and assail the imperfection which may appear in the result, this court has taken occasion to characterize. "They assail," it was said, "the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute and to correct

them if found to exist, or attack as crude or inexpedient the action of the Commission in the performance of the administrative functions vested in it, and upon such assumption invoke the exercise of an unwarranted judicial power to correct the assumed evils." *Interstate Commerce Commission v. Illinois Central Railway Company*, 215 U. S. 452, 472. (Italics ours.)

The District Court should have dismissed the bill of complaint.

J. CARTER FORT,

For the Interstate Commerce Commission.

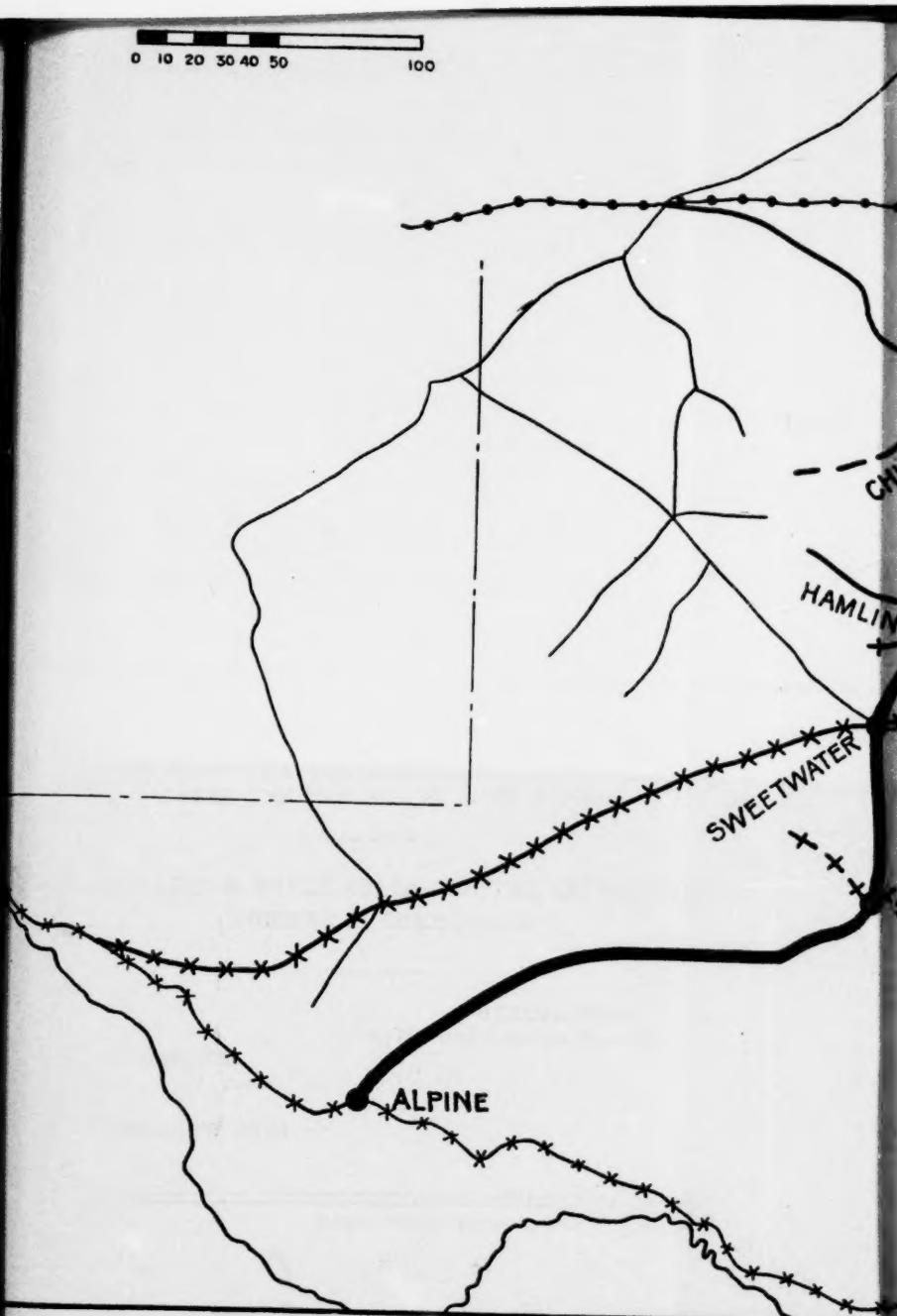
P. J. FARRELL,

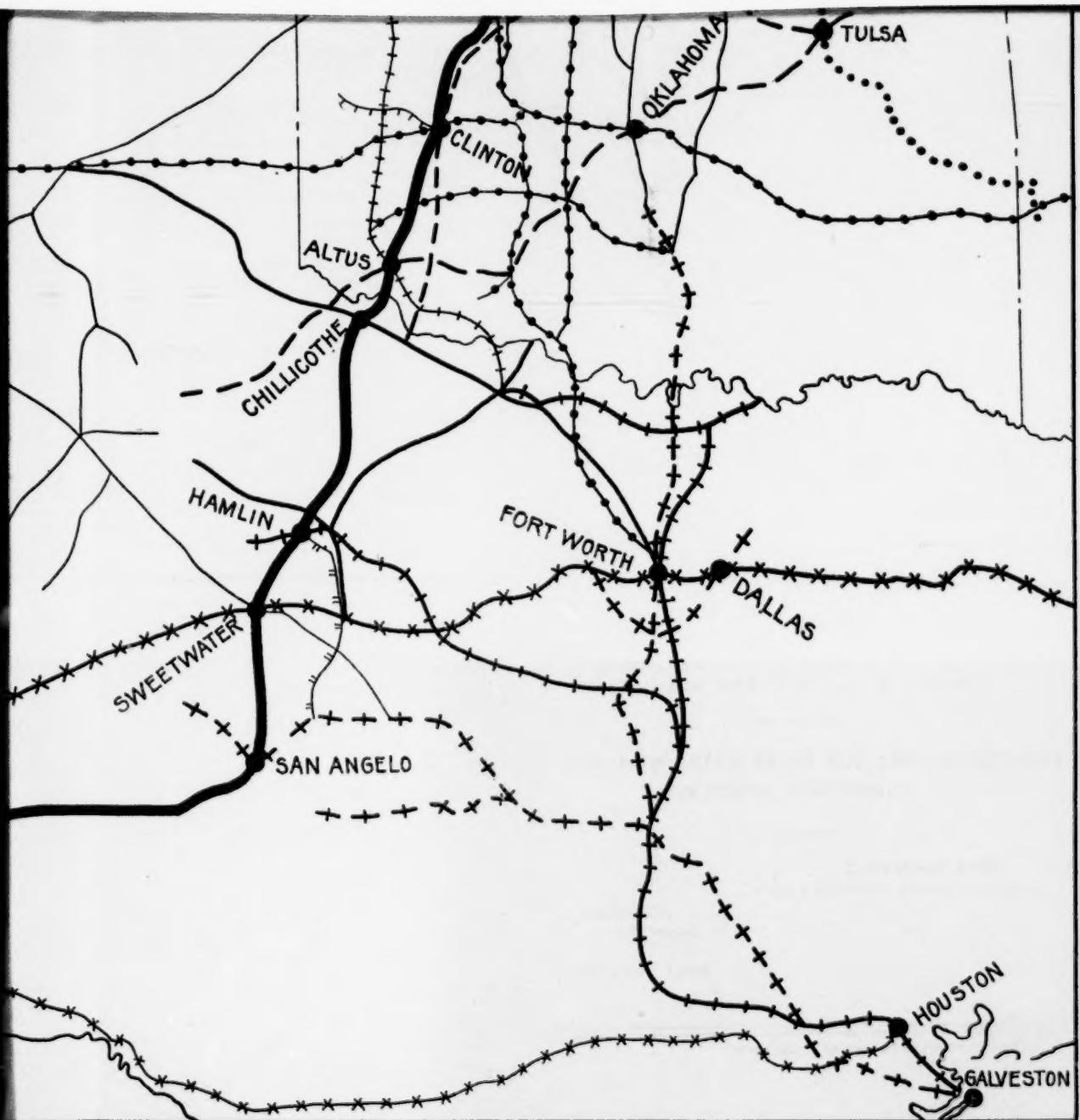
Of Counsel.

FEBRUARY, 1924.

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No. 456.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, APPELLANTS,

v.

ABILENE & SOUTHERN RAILWAY COMPANY, THE
ATCHISON, TOPEKA & SANTA FE RAILWAY COM-
PANY, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF KANSAS.

MEMORANDUM REPLY BRIEF FOR THE INTERSTATE
COMMERCE COMMISSION.

J. CARTER POET,
For the Interstate Commerce Commission.

P. J. WARRELL,
Of Counsel.

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No. 456.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF KANSAS.*

MEMORANDUM REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

This case was fully argued in our original brief and in the briefs for the United States and the Orient Railroad. We do not propose to repeat here what has been said already. But it seems desirable to comment upon certain statements in the "Brief for Appellees."

Page 2:

It is said that—

While one arm of the Government was thus cutting the income of the Orient and its con-

nnections, the appellants, another governmental body, the United States Railroad Labor Board, had caused an advance of wages aggregating to the Orient (Com. 272) the burdensome amount of \$325,000 per annum.

The record reference shows merely that the Orient had petitioned the Labor Board for permission to reduce its wages, and that if its petition were granted the Orient would save approximately \$325,000 per annum.

Pages 2 and 3:

In an effort to show "what kind of a railroad the Orient has been from the beginning," counsel state—

It was shown (Com. 312) by Exhibit 22 that from 1905 down to 1920 the Orient had failed to earn operating expenses in every year except 1903, 1904, 1907, and 1913.

Exhibit 22 shows such operating deficits as follows:

1905.....	\$5, 570. 60	1914.....	\$28, 516. 60
1906.....	3, 119. 69	1915.....	273, 513. 83
1908.....	104, 324. 26	1916.....	468, 952. 00
1909.....	192, 303. 49	1917.....	580, 144. 60
1910.....	61, 514. 79	1918.....	695, 246. 00
1911.....	145, 117. 78	1919.....	1, 223, 369. 00
1912.....	334, 095. 03	1920.....	1, 461, 279. 60

The figures thus shown as "operating deficits" in appellants' brief are not the operating deficits and are not so shown in Exhibit 22. These figures represent deficits after "deductions from income." The Exhibit does not show what constituted the "deductions from income," but there can be no doubt that among

other things interest was included. Instead of showing operating deficits for every year except 1903, 1904, 1907, and 1913, Exhibit 22 shows that the railway operating revenues exceeded the railway operating expenses for every year prior to Federal control, except 1909 and 1914.

Exhibit 22 was introduced in evidence by counsel for appellees during the cross-examination of a witness on behalf of the Orient. The exhibit has many infirmities. The figures covering the years 1905 to 1912 include not only the operations of the Orient line in the United States, which is the carrier in which we are interested, but also the operations of the so-called Orient lines in Mexico, which are in no way affected by the Commission's order. Furthermore, the figures for the year 1914 cover the operations only of the Orient lines in Oklahoma and Kansas instead of the operations of the Orient System in the United States. Still further, the Orient lines in the United States were not completed from Wichita to Alpine until 1913, and therefore the operating results prior to that time are of little significance.

The operating income of the Orient System in the United States for the years 1912 to 1921, inclusive, is shown in the Commission's report. (See. p. 12.) During that period and prior to Federal control there was an operating deficit, after taxes, for only three years 1912, 1914, and 1917; for the three-year period 1915, 1916, and 1917 there was an operating profit.

There were large deficits for the years 1918, 1919, 1920, 1921. During Federal control, beginning January 1, 1918, and extending to March 1, 1920, very abnormal conditions affecting transportation prevailed all over the United States. Costs were extraordinarily high, and as a matter of policy the Government did not attempt to make rates correspondingly high. The result was that railroad operation generally by the Government was very unfavorable from a financial point of view. So far as the Orient companies are concerned, however, they were not affected by these losses during the period of Government operation. Under the provisions of the Federal control act the companies whose properties were taken over received compensation from the Government, based, generally speaking, upon the result of their operations during the test period; that is, the three-year period ending June 30, 1917. For six months after the termination of Federal control—that is, until September 1, 1920—rates were not raised to meet the new conditions. In view of this fact, the Government guaranteed a return to the railroads during this period on the basis of the compensation which they had received during Federal control. Therefore the operations for 1920, as well as the operations for 1918 and 1919, are not to be regarded as in any way significant.

From what we have said it appears that the history of operating deficits as set forth in appellees' brief is based upon erroneous figures and is entirely without significance.

Page 3:

The testimony of Mr. Shaufler, Traffic Manager of the Orient, is quoted, in part, as follows:

If the property was to continue there [from Wichita to Alpine] as it is now, it would be impossible to make operating expenses.

Mr. Shaufler could have meant only that under then existing rates and divisions (and it should be remembered that 84 per cent of the freight revenue of the Orient arises from divisions) it would be impossible for the Orient to earn operating expenses. The quotation in appellees' brief is from page 187 of the record before the Commission.

On page 186 the following appears:

Mr. Wood. Q. In your opinion, Mr. Shaufler, as an experienced traffic man, familiar with this property, will it ever be able to maintain itself and pay a return to the owners until it is put through according to the original program to the Pacific coast?

A. I believe that the property will pay operating expenses, and, I might say, at least operating expenses when it is completed to Kansas City.

Q. You mean even under the present basis of divisions it would pay operating expenses if completed to Kansas City?

A. It would put the Orient Railroad in position to get its full share of transcontinental traffic or traffic to and from territory where it would be in position to handle.

Q. That is to say, if your line were completed through to Kansas City, in your judgment you

would not be here asking a readjustment of directions in order to make operating expenses.

A. That is my personal opinion. [Italics ours.]

The fact that the Orient did actually earn its operating expenses, after taxes, for the three-year period prior to Federal control, seems to be a complete answer to any suggestion that, under reasonable conditions it could not be expected to earn operating expenses.

Page 4:

It is stated that an estimated deficit for the Orient of \$1,315,000 "is almost as much as the gross revenue of the Orient for any year of its history as shown (Com. 312) in its exhibit 22." Exhibit 22 was not an exhibit of the Orient, but was introduced by appellees.

This Exhibit, however, shows the railway operating revenue of the Orient for 1920 as \$3,716,397; 1919, \$2,834,050; 1918, \$2,448,332; 1917, \$2,526,123; 1916, \$2,599,332. In addition, Exhibit 1 (Record before the Com., p. 264), shows that in 1921 the operating revenues of the Orient were \$3,988,998.25, or substantially \$4,000,000.

Page 4:

It is said, apparently to show that the Orient is not an important or necessary railroad, that—

The line was built (Com. 100) into a cattle country. It was built into a country (Com. 101) where "on several occasions in Texas all of the cattle would have perished and died on account of drought."

The sentence of the witness which is quoted in part in appellee's brief reads in its entirety:

I might also say that if it had not been for the Orient Railroad, on several occasions in Texas all of the cattle would have perished and died on account of drought.

The complete testimony of the witness in this connection is as follows:

The territory between Wichita and San Angelo, Texas, to-day is used for the purpose of raising grain, hay, cotton, and farm products.

The territory between San Angelo and Alpine is still given over to the raising of livestock. The land in that territory before the Orient was completed or built in that territory was worth from 50 cents to a dollar an acre. To-day the values are greater, and we will give them later.

I might say, however, that when the Orient started to handle livestock from Texas and Oklahoma, they were of a different class than you find to-day. They were mostly horns and bones. To-day they are a fine-breed variety. Some of the finest cattle raised in this country to-day are raised in Texas, tributary to the Orient Railroad.

I might also say that if it had not been for the Orient Railroad on several occasions in Texas all of the cattle would have perished and died on account of drought.

Mr. WOOD. (Q.) All the cattle in the State of Texas?

A. Tributary to the Orient Railroad.

Page 5:

Appellees say that—

The Orient is so paralleled that if the Commission were to attempt to relieve it by giving it specially high rates the shippers would drive their cattle or haul their products to competing lines.

That refutes the statement of the Commission (Trans. 14) drawn from a record other than this, that the Orient "is of essential importance in meeting the transportation needs of the public within the territory which it serves."

The record does show that the Orient, like any other line of railroad, would lose a portion but "not the greater amount" (Rec. before the Com., p. 160) of its traffic to competing lines if its rates were higher than those of competing lines. There are points where the Orient is crossed by other lines, and there are parts of its line which compete with other lines for a certain amount of business. As we have suggested, this is not a condition in any way peculiar to the Orient, but a condition which prevails on every line of railroad.

The map which is appended to the Commission's original brief shows that for long stretches in Texas there is no other railroad within 40, 50, or 60 miles of the line of the Orient. The record shows that the Orient lines "now carry higher rates on cattle

than our [its] connections or the railroads operating in Texas, * * *. We do not mean to reargue here the question of the importance or the essential character of the Orient Railroad, which is fully argued in our original brief and the brief for the Orient. The appellees do not dispute that there is evidence in the record tending to show the essential character of this railroad, and certainly it can not be disputed that this is a matter for the Commission's judgment. What counsel attempt to do is simply to point out scattered and fragmentary statements and draw from them a conclusion contrary to the conclusion reached by the Commission upon the whole record.

Page 6:

It is said that

As it costs the Orient \$1.1163 to earn a dollar, its case is hopeless so far as relief from revenue from its connections is concerned. No matter what ~~its~~ income, it would be a loser under such operation. * * * A dollar costing \$1.1163 is a damage. In such circumstances the Orient must either cease operating or it must take some steps to bring its costs within its income.

The thought seems to be that the ratio of expense to revenue would not be changed by changing one factor, namely, the revenue, while the other factor, namely, the expense, remained constant. It is said that the Orient must cease operating or take steps to bring its costs within its income. Obviously there is another remedy, it may bring its income up to its costs.

Pages 19 and 20:

Appellees say that the financial condition of the Orient and its connections cannot be taken into consideration in fixing divisions unless the connections are earning more than a return of $5\frac{1}{2}$ to 6 per cent. In other parts of the brief this thought is reiterated. A conclusive answer is furnished by the *New England Divisions Case*, 261 U. S. 184. The court pointed out that financial needs were properly considered in that case in raising the divisions of the New England lines and reducing the divisions of the lines west of the Hudson. Not only were many individual lines whose divisions were reduced in that case earning less than 6 per cent, there was evidence to show that the 29 carriers in the eastern group, excluding New England, taken together, would earn only 4.55 per cent and that 15 of these carriers would earn less than 3 per cent. See the record in that case, pages 670, 671.

Here it is admitted that all of the Orient's connections affected by the Commission's order are earning larger returns than the Orient. Furthermore, here there was no showing that the western carriers, taken as a whole, were earning less than a fair return.

Pages 22 and 23:

An attempt is made to distinguish the *New England Divisions Case* on the ground that there the record contained information concerning specific divisions.

As fully explained in the original brief for the Commission, pages 40-43, in this case there is evi-

dence which served the same purpose and served it better.

Pages 23 and 24:

Another effort is made to distinguish the *New England Divisions Case* by showing that in that case the Commission refused to fix divisions of the Bangor & Aroostook and refused to fix the divisions on certain commodities because there was no evidence in respect of such divisions. Of course, the Commission can not fix divisions without evidence, and it properly restricted itself in the *New England Divisions Case* within the field covered by the evidence. In this case the evidence extends over all of the interchanged traffic between the Orient and each of its connections.

Page 29:

It is said,

Why did not the Commission go into this subject and find out what were the needs of the carriers in the western group and provide a level of rates which would have taken care of them all and given them a margin over for the help of the Orient? That is the course which it took in the *New England Divisions Case*.

The Commission took no different course in the *New England Divisions case* in this respect from the course which it followed in this case. In each instance the Commission had fixed a level of rates designed to yield a fair return to the carriers as a whole. If the suggestion of counsel means that in connection with its consideration of the Orient's divisions, the

Commission should have opened up a general rate case without request from any railroad, in order to redetermine and refix the level of rates for the western group, it needs no answer.

Page 37:

In criticising the Commission's use of "equated ton-mile" figures, counsel say: "A freight ton-mile expresses horsepower spent or the labor done" and "A passenger-mile means distance traveled without any relation to the cost or labor of compassing the distance." They then say: "You can not add weight carried to distance traveled and thereby produce any sound measure of what the Commission called "all revenues and all expenses."

We do not know what counsel have in mind, but the fact is plain enough. Both a "passenger-mile" and a "freight ton-mile" are units of transportation. In one case the unit is the transportation of one ton of freight for a distance of one mile; and in the other case, the unit is the transportation of one passenger for a distance of one mile. Neither one expresses horsepower spent or labor done or distance traveled.

Page 40:

It is emphasized that the Orient received \$0.0147 per ton-mile for services performed on interchange business, and its connections, taken together, received \$0.012 per ton-mile. From this it is argued that the Orient is receiving its just share, or more than its just share, of the rate as compared with its connections. But the figures tend strongly to support a conclusion directly opposed to that suggested when the character

of the Orient, its light traffic density, its small per train revenues, etc., are considered, together with other facts tending to show its relatively high operating costs. (See page 43 *et seq.* of the Commission's brief.) It then becomes apparent that the Orient's per ton-mile revenue, as compared with the ton-mile revenue of its connections on interchange business, is not high enough. In this connection, it is important to observe that while the average ton-mile revenue of the Orient was 1.47 cents on its interchange business, its operating expense per equated ton-mile on all business was 1.99 cents, or considerably higher. The showing as to appellees, taken together, is different. Their average ton-mile revenue, on business interchanged with the Orient, was 1.185 cents, while their operating expense per equated ton-mile on all business was only 1.14 cents.

Furthermore, the question of whether the per ton-mile revenue of the Orient on interchange business as compared with the per ton-mile revenue of its connections was high enough in view of the circumstances and conditions, was manifestly an administrative question to be decided by the Commission.

Pages 41, 42, 43:

An attempt is made to claim confiscation. The contentions urged have been answered already, but we wish to call attention to the statement beginning at the bottom of page 42:

Since on the Commission's own data and its own peculiar method of calculation the record discloses that eleven of the thirteen

appellees would fail to receive operating expenses out of the divisions, * * *.

There is nothing in the record which shows that eleven of the appellants or one of appellants will receive less than operating expenses out of the divisions. What counsel means is that in some cases the appellants will receive a per ton-mile revenue out of the divisions which is less than the average per ton-mile operating expense on all system business, freight and passenger. Such figures, of course, do not show, for the purpose of establishing confiscation, what the operating expenses are on the freight business which appellants interchange with the Orient. Strangely enough, the very figures which are here relied upon to show confiscation are discredited by counsel on pages 35 and 36 of their brief. The significance of these figures is discussed in the Commission's original brief on pages 59 and 60.

J. CARTER FORT,

For the Interstate Commerce Commission.

P. J. FARRELL,

Chief Counsel.

FEBRUARY, 1924.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA AND INTER-
state Commerce Commission, appellees,

v.

ABILENE & SOUTHERN RAILWAY COM-
pany, The Atchison, Topeka & Santa
Fe Railway Company, The Chicago,
Rock Island & Pacific Railway Com-
pany, et al.

No. 456.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.¹

Holding that the record of the evidence before the Interstate Commerce Commission was an empty record, the District Court (Circuit Judge Lewis and District Judge Symes concurring, Tr. 35, and District Judge Kennedy dissenting, Tr. 48) annulled and permanently enjoined for lack of any evidence to support it (288 Fed. Rep. 102) (Tr. 55) the order of

¹ The pleadings, court proceedings, and appeal papers were printed by the Clerk of this Court and will be referred to as the transcript, thus, "Tr. 4." The record of the evidence and proceedings before the Commission is separately printed and will be referred to as Commission Record, thus, "Com. Rec. 8."

the Interstate Commerce Commission which increased the divisions of the Kansas City, Mexico & Orient Railroad Company (William T. Kemper, Receiver).

Under Transportation Act, 1920, Ch. 91, Sec. 418, 41 Stat. 456, 486, amending Interstate Commerce Act, Sec. 15 (6), the Interstate Commerce Commission, upon consideration of an application filed on behalf of the company (Com. Rec. 63), instituted an inquiry particularly to determine whether or not "the division of joint rates, fares, and charges on traffic interchanged between the said applicants and other carriers subject to the Interstate Commerce Act are unjust, unreasonable, inequitable, or unduly preferential or prejudicial, within the meaning of paragraph (6) of section 15 of said act; and if so, the just, reasonable, and equitable divisions thereof that should be received by the several carriers."

Forty trunk line railway companies (Com. Rec. 64) were named as respondents, comprising all of the principal lines serving the territory west and southwest of Chicago (Com. Rec. 395). Thirteen of these trunk lines have connections² with the Orient

² The connections of the Orient with the trunk lines are as follows: Missouri Pacific at Wichita and Anthony, Kans.; Chicago, Rock Island & Pacific at Wichita and Anthony, Kans., and Clinton, Oklahoma; Atchison, Topeka & Santa Fe at Wichita and Anthony, Kans.; St. Louis-San Francisco at Wichita, Kans., Clinton and Altus, Oklahoma; Midland Valley at Wichita, Kans.; Clinton & Oklahoma Western at Clinton, Oklahoma; Wichita Falls & Northwestern at Altus, Oklahoma; Fort Worth & Denver City at Chillicothe, Texas; Missouri, Kansas & Texas of Texas at Hamlin, Texas; Abilene & Southern at Hamlin, Texas; Texas & Pacific at Sweetwater, Texas; Gulf, Colorado & Santa Fe at Sweetwater and San Angelo, Texas; Galveston, Harrisburg & San Antonio at Alpine, Texas.

(Com. Rec. 397), but its principal witness testified, "we have no friendly connections" (Com. Rec. 93), and it was alleged that in many instances "where divisions have been established by its connections on an arbitrary basis these connections have declined to shrink their arbitrariness when the through rates have been reduced." (Tr. 17.)

On May 15, 1922, the hearing before the Commission commenced. (Com. Rec. 69.) The case was submitted on May 16, 1922. Counsel for the trunk-line connections of the Orient Company rested the case on the examination and the cross-examination of witnesses who produced certain exhibits and testified on behalf of the Orient Company. Certain other exhibits containing statistical information furnished by the trunk-line connections at the request of the Commission made before the hearing were also filed. At the close of the examination of the witnesses counsel for the trunk lines stated, "The respondents have no evidence to offer in this proceeding." (Com. Rec. 258). The case was submitted by all of the parties without briefs or oral argument. (Com. Rec. 262, 263.)

On August 9, 1922, nearly three months later, the Commission filed its report (Tr. 9) and entered its order (Tr. 3) wherein and whereby the Commission ordered (Tr. 4) "That on and after September 15, 1922, the divisions of interstate joint rates received by Abilene & Southern Railway Company * * * hereinafter termed the connecting lines, on freight traffic interchanged with the Kansas City, Mexico &

Orient Railway Company and its receiver, and the Kansas City, Mexico & Orient Railway Company of Texas, and their successors, hereinafter termed the Orient, shall not exceed the following percentages of the divisions accruing on such traffic to said connecting lines, respectively: " Abilene & Southern, 85%; (a) Atchison, Topeka & Santa Fe, (b) Galveston, Harrisburg & San Antonio, and (c) Wichita Falls & Northwestern, 75%; (a) Chicago, Rock Island & Pacific, (b) Midland Valley, (c) Missouri, Kansas & Texas, (d) Missouri Pacific, (e) St. Louis-San Francisco, (f) Texas & Pacific, 80%; (a) Fort Worth & Denver City and (b) Gulf, Colorado & Santa Fe, 70%; Clinton & Oklahoma Western, 90%.

Divisions of joint rates applicable to traffic as to which the Orient is an intermediate carrier shall be adjusted by the connecting lines on relative basis of proportions prescribed above. (Tr. 4.)

Stated in another form, there shall be deducted from the revenue or proportion accruing under divisions to the trunk-line connections and added to the revenue or proportion of the Orient 15% for Abilene & Southern; 25% for (a) Atchison, Topeka & Santa Fe, (b) Galveston, Harrisburg & San Antonio, and (c) Wichita Falls & Northwestern; 20% for (a) Chicago, Rock Island & Pacific, (b) Midland Valley, (c) Missouri, Kansas & Texas, (d) Missouri Pacific, (e) St. Louis-San Francisco, (f) Texas & Pacific; 30% for (a) Fort Worth & Denver City and (b) Gulf, Colorado & Santa Fe; and 10% for Clinton & Oklahoma Western.

In an opinion concurred in by two members, covering 13 closely printed pages of the transcript (Tr. 35) the District Court in effect sustained the allegation of the bill (Tr. 5) "that the said order of the Commission was made without evidence to support it and that the record was entirely bare of any testimony or other proof that the divisions at that time * * * were in any way unfair or unreasonable or unduly preferential or prejudicial."

If, therefore, there is any evidence in the record to sustain the order the decree of the District Court should be reversed.

II.

THE TRANSPORTATION ACT.

The Transportation Act of 1920 is entitled "An act" (a) "to provide for the termination of Federal control * * *"; (b) "to provide for the settlement of disputes between carriers and their employees;" (c) "to further amend" the act to regulate commerce of 1887, as amended (41 Stat. 456), approved February 28, 1920. It consists of five titles, viz, I.—Definitions; II.—Termination of Federal control; III.—Disputes between carriers and their employees and subordinate officials; IV.—Amendments to interstate commerce act; V.—Miscellaneous provisions.

Inter alia, in order "to best promote the service in the interest of the public and the commerce of the people" (41 Stat. 476, 477); to "best meet the emergency and serve the public interest," * * *

"properly to serve the public" (41 Stat. 477); "that the public interest will be promoted" (41 Stat. 482); to consider "the transportation needs of the country" (41 Stat. 488); to meet the necessity of enlarging the facilities "in order to provide the people of the United States with adequate transportation" (41 Stat. 488); to enable the carriers "properly to meet the transportation needs of the public" (41 Stat. 491), the Congress of the United States, in enacting the Transportation Act of 1920, proceeded along comprehensive lines.

It is readily observable that the so-called "divisions paragraph" adds power to the Commission to fix the divisions as between the carriers commensurate with the power granted to the Commission under all of the other sections, all to the end that an adequate system of transportation may be provided.

The Transportation Act of 1920 provides (C. 91, 41 Stat. 474, 475):

SECTION 400. The first four paragraphs of section 1 of the interstate commerce act, as such paragraphs appear in section 7 of the Commerce Court act, are hereby amended to read as follows:

* * * * *

(4) It shall be the duty of every common carrier subject to this act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to pro-

vide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

The Transportation Act of 1920 further provides (C. 91, 41 Stat. 484, 486):

SECTION 418. The first four paragraphs of section 15 of the interstate commerce act are hereby amended to read as follows:

* * * * *

(6) Whenever, after full hearing upon complaint or upon its own initiative, the commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the commission and the divisions thereof are found by it to have been unjust, unreasonable, or

inequitable, or unduly preferential or prejudicial, the commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares, and charges, the commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstances which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

III.

THE EVIDENCE.

The Kansas City, Mexico & Orient line extends from Wichita, Kansas, to Alpine, Texas, 737 miles. (Tr. 10.) Construction of the line in Mexico was commenced in 1901 and has been completed in parts.

That line, however, is not involved in this proceeding, which concerns only the mileage in the United States. (Tr. 11.) The investment in road and equipment, less depreciation, as of December 31, 1921, is reported as \$21,969,730.31. The Kansas City, Mexico & Orient Railway Company of Texas was organized July 5, 1899. The investment in road and equipment of that company, less depreciation, as of December 31, 1921, was reported as \$6,878,360.62; the total for both companies being \$28,848,090.93. For the years 1912 to 1921, inclusive, except for the years ended June 30, 1913, 1915, and 1916, the Orient System in the United States operated with increasing deficits. In 1922 these deficits amounted to, in January, \$105,289.00; February, \$59,432.00; March, \$59,346.00; April, \$116,539.00. (Tr. 12.)

The principal products originating on the line are livestock, cotton and grain, and other products of agriculture. The road operates through 4 counties in Kansas, 8 in Oklahoma, and 16 in Texas, serving 13 county seats, of which 5 are served exclusively. An estimated area of about 23,272 square miles, with a population of approximately 500,000, is served by this carrier, and the property value, exclusive of cities and towns, is placed at \$204,250,000. (Tr. 13.) Between Wichita and Altus, Okla., there are grain elevators at all stations and in southern Oklahoma there are several cotton gins. At Hamlin, Texas, a cement-plaster mill is served exclusively by the Orient. There are no mining or lumbering activities along the line and the company is under the necessity of

purchasing all of its coal and ties at points off its line, resulting in increased expense on these items. (Tr. 13.)

The Orient is not primarily an originating carrier but a large proportion of its freight tonnage is handled as an intermediate carrier. Thus, for the years 1917 to 1921, inclusive, the total revenue freight carried averaged approximately 1,300,000 tons. (Tr. 13.) On the basis of one ton of freight moving for a distance of one mile, the figures for 1921 show 57,020,117 ton-miles originating on the Orient; 39,331,668 ton-miles delivered on the Orient; and 89,058,723 ton-miles intermediate. (Tr. 13.)

The Commission reiterated its previous finding "that the Orient System, or at least that part which lies within the United States, is of essential importance in meeting the transportation needs of the public in the territory which it serves." (Tr. 14.)

The Orient asked only a sufficient measure of relief to enable it to continue operations and made no request for a return upon investment. (Tr. 12.) It was claimed that the loss of revenue during the period of Federal control, which was far heavier than that for other years, was largely due to changes in the routing of traffic and that since the termination of Federal control the former conditions have not been restored. The record indicates that a substantial portion of the through traffic of the Orient was received from the Southern Pacific and that the latter reduced its deliveries on account of alleged unsatisfactory service of the Orient. (Tr. 12.) However,

no allegation of inefficient operation appears in the record against the Orient or any of the respondent connecting lines. (Tr. 14.)

According to its own estimate, the deficit of the Orient for 1922 will amount to \$1,590,213.00. (Tr. 14.) For the year ended December 30, 1920, interest was accrued amounting to \$311,526.65, of which only \$17,622.95 was paid. For the year ended December 31, 1921, interest accrued amounting to \$514,665.32, of which \$150,000.00 was paid, this payment being applicable to a loan of \$2,500,000.00 to the receiver under Section 210 of the Transportation Act of 1920. (Tr. 14.)

The purposes which the statute was designed to subserve were before the Commission continuously and in its report in the instant case the Commission observed "This provision has been considered by us heretofore." (Tr. 13), citing *Pittsburgh & W. Va. Ry. Co. v. P. & L. E. R. R. Co.*, 61 I. C. C. 272; *New England Divisions*, 66 I. C. C. 196. The Commission had already considered the so-called "equated ton-mile" rule. *Division of Joint Rates and Fares of M. & N. A. R. R. Co.*, 68 I. C. C. 47 (Tr. 13, 15). Counsel for the Commission define an "equated ton-mile" as a transportation unit derived by adding to the ton-miles of freight three times the number of passenger-miles; the passenger-miles are "equated" into ton-miles on the basis of three ton-miles to one passenger-mile.

Following a statement entitled "Comparison of Unit Revenues, and Return for Year Ended Decem-

ber 31, 1921" (Tr. 16), compiled from the annual reports on file with the Interstate Commerce Commission³ of the Kansas City, Mexico & Orient and its 13 connections, the Commission found (Tr. 17):

The gross revenue of the Orient per equated ton-mile is greater than that of nine of its connections, and its earnings per car-mile are substantially smaller than eleven of the thirteen connections, while the earnings per train-mile are in each instance materially less, thus evidencing a smaller and less profitable train and car load, the usual incident of a light traffic. The operating expenses per equated ton-mile are greater than those of any connection except two small roads, namely: Abilene & Southern and the Clinton & Oklahoma Western, and its expenses per car-mile are substantially greater than those of the nine larger roads, while the expenses per train-mile are in six instances materially less. The general result is that while the Orient sustained a deficit in its net railway operating income of sixty-nine cents per train-mile, all of its connections received incomes ranging from thirty cents per train-mile in the case of the Galveston, Harrisburg & San Antonio, to \$1.84

³ All the judges sitting in the District Court treated the exhibits as data made "from the annual reports of the carriers on file with the Commission. Circuit Judge Lewis (288 Fed. Rep. 112; Tr. 44, 45): "But taking the data extracted by the Commission from the annual reports and embodied in its opinion, their utilization was comparative—not self-probatative of the ultimate fact, but supposedly a means to ascertain that fact." District Judge Kennedy (288 Fed. Rep. 116; Tr. 49): "The chief criticism is that the Commission considered the annual reports of the carriers themselves in arriving at their conclusions. These reports are filed with the Commission, and so far as the carrier is concerned are authentic and binding upon it."

per train-mile in the case of the Fort Worth & Denver City.

In other calculations the results as distinguished between freight and passenger traffic have been separately considered, based upon an allocation in accordance with our plan to include all operating revenue accounts. The operating ratios of the carriers concerned in respect of all revenue received show that the freight operating ratio is less than the passenger operating ratio with exception of the Atchison, Topeka & Santa Fe, Fort Worth & Denver City, St. Louis-San Francisco, and the Texas & Pacific, for which the freight ratio is high. In the case of the Fort Worth & Denver City, Missouri, Kansas & Texas of Texas, and Midland Valley, the two ratios are substantially equal, which is also true of the combined result of the eleven major roads used in the calculations. It also appears that the freight ratio of the Orient (1.0791) is approximately 141 per cent of the average freight ratio of the other connecting lines (0.7663), while the passenger ratio of 1.3518 is approximately 175 per cent of the average passenger ratio of (0.7718) the eleven major connections.

The disparity of 41 per cent in the case of freight service and 75 per cent in the case of passenger service would seem to indicate that the passenger fares and freight rates and divisions accorded this carrier are not sufficient to meet even the maintenance, traffic, transportation, and general expenses properly to be charged against either the freight or passenger traffic, to say nothing of taxes, equipment

rental, and a fair return on the property investment used in the service. As stated above, however, the Orient is seeking only such revenue as will enable it to operate the road, and is asking nothing for its security holders.

In compiling from the annual reports and considering the "equated ton-mile" figures the Commission was acting within its power.

It is observable the law requires that these annual reports shall be accurately compiled. There is not only forfeiture attached for failure to comply with the law but a severe penalty for false swearing. See Section 20, as amended, Appendix A.

Keeping before us at all times the fact that the Orient Company had "no friendly connections" and the charge that in many instances "where divisions have been established by its connections on an arbitrary basis these connections have declined to shrink their arbitrariness when the through rates have been reduced" (Tr. 17), to save themselves the appellees are driven to the extreme of claiming that the material assembled and considered by the Commission taken from their annual reports was inadmissible.

The statute provides that these public records "shall be received as *prima facie* evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; * * *." (App. 41.) By law, therefore, these annual reports and each and every one of them, or any part thereof, were always in evidence in any proceedings in which they were relevant. The rule

of the Interstate Commerce Commission cited by the District Court (Tr. 44) contains nothing to the contrary. It is a rule of convenience for the Commission and the parties and is not a rule which changes the statute or deprives the Commission of the right to consult records prepared and filed by the carriers under the statute.

Counsel emphasize the words of this Court in the footnote to the opinion in the *New England Divisions case*, 261 U. S. 198, viz: "Papers on the Commission files are not a part of the record in a case,—unless they are introduced as evidence." Under that holding they say that the figures compiled and considered by the Commission were inadmissible. The Court was discussing division sheets and further said: "It is the nature of the enquiry, not the accident whether papers are on file or published, which determine whether facts can be proved by evidence which is typical."

The charge in the bill is that the figures "were constructed by the Commission from matter which was not submitted in evidence before the Commission, which plaintiffs did not know was to be used, upon which they had no opportunity to cross-examine, and which matter was considered and treated by the Commission, as shown by its report, as relevant and material." (Tr. 8.)

It is noteworthy that they do not allege that the figures were erroneous; that any cross-examination with respect thereto would have shown anything

else; that they were in any manner prejudiced thereby, or that they would have offered other figures or evidence to counteract what the figures show and what such other figures and evidence are.

The learned District Court held (Tr. 45; 288 Fed. Rep. 102, 112) "that the annual reports and the data which they contain were not made a part of the record, and were not properly before the Commission for consideration in reaching its conclusion." After so holding the learned District Court proceeded, of its own motion, and on its own account, to consider the annual reports and the data which they contain or as compiled therefrom as insufficient evidence, or any evidence, to support the order of the Commission, thus substituting the judgment of the court for that of the Commission on whether (1) the annual reports were before the Commission and (2) the effect thereof. This was assigned as error. (Tr. 71.)

In *Ex parte 74, Increased Rates 1920*, 58 I. C. C. 220, these 13 connections and the other 37 trunk lines which constituted the 40 before the Commission, and which are located in the Western Group, were allowed an increase of 35% in freight rates. The footnotes in the Commission's report, "*Compiled by the Commission's Bureau of Statistics*," indicates that these carriers were entirely satisfied that the Commission should compile tables and statistics on which to base the 35% increase. Their dissatisfaction to the practice appears to show itself only when the Commission undertakes to distribute the

revenue by adjusting the divisions. 58 I. C. C. 234, 236, 238, etc.

Sound argument against the action of the District Court on that subject is the vigorous dissenting opinion of District Judge Kennedy. (Tr. 49; 288 Fed. Rep. 102, 116.)

Unfriendly to the Orient Company; declining to "shrink their arbitrariness when the through rates have been reduced;" failing to offer any evidence, file briefs, or present oral arguments to the Commission; and without allegation in any form that the figures are incorrect or that they were in any way prejudiced thereby; and without any subsequent offer of proof either to the Commission or to the court to meet that which was taken from their annual reports which they had previously filed with the Commission in pursuance of the statute, it is submitted that the holding of the District Court sustaining the charge of the appellees cannot stand.

It is obvious that the course pursued by appellees was not to furnish evidence and enlighten the Commission on these divisions and the effect on the respondents of any increase to the Kansas City, Missouri & Orient, but only to discredit, as far as possible, the applicant's evidence, interpose objections to the proofs offered by it, offer none whatever on behalf of themselves, file no brief, make no argument, and take their chances against an adverse order. Under such circumstances their position in appealing to a court of equity and good conscience to enjoin an order alleged to be confiscatory of their property may not prevail.

IV.

PRODUCTION OF ALL OF THE DIVISION SHEETS WAS UNNECESSARY.

In the District Court the learned counsel argued that the Commission should have brought in all of the division sheets applying to all of the 13 connecting lines and the 10 defendants before the Commission as well. Their further contention that *all* carriers should have been made defendants before the Commission would have necessitated, if their arguments were sound, that *all* division sheets, covering *all* traffic, over *all* lines should have been offered and a hearing had thereon.

While the order is directed against the 13 connections of the Orient Company, it by no means follows that the 13 must stand all of the shrinkage. It is not to be assumed that such great systems as the Southern Pacific and the Santa Fe and others of the 13 will not require that their connections shall bear substantial parts of the shrinkage. The shrinkage of the divisions may well be distributed among all lines over which the traffic moves. Thus, if the freight charge is \$400 on a carload of machinery carried from Akron, Ohio, to Clinton, Okla., divided B. & O. to St. Louis, \$125; C. B. & Q. to Kansas City, \$100; Santa Fe to Wichita, \$100; and Orient to Clinton, \$75; and the Santa Fe gives up 25% to the Orient, making the new divisions Orient \$100 and Santa Fe \$75, there is nothing in the order to prevent the Santa Fe and its other connections from readjusting their divisions on a new basis, say, Santa Fe,

\$92.50; C. B. & Q., \$92.50; and B. & O., \$115, or on any other acceptable basis. The order dealt with divisions as they existed on August 9, 1922, and the increases were based on "the following percentages of such divisions" (Tr. 18). In giving directions with respect to the readjustment the Commission uses the words "*present divisions*" (Tr. 19). The procedure followed was similar to that followed in the *New England Divisions Case*, where the Hudson River was the basic line on which the increase of 15% to the New England lines was made. The lines both east and west of the Hudson were left free to work out their own subdivisions among themselves. In the instant case, as in that case, the Commission invited the connecting lines to come in again, in the event they could not agree (Tr. 19).

E. H. Shaufler, General Traffic Manager of the Orient System, with respect to Exhibit No. 14, "Map showing Division Groups east of the Mississippi River and west of El Paso, Texas," testified as follows (Com Rec. 118, 119):

Examiner BURNSIDE. Proceed.

The WITNESS. This has a bearing on divisions for the reason there may be some dispute as to the divisions in the handling of this traffic.

Mr. BOYD. We now offer in evidence as Exhibit No. 14 a map showing the division groupings east of the Mississippi River and west of El Paso, Texas.

Examiner BURNSIDE. It will be received as Exhibit No. 14.

(Thereupon the exhibit so offered and identified was received in evidence, marked "Applicant's Exhibit No. 14, Witness Shaufler," and the same is forwarded herewith.)

Mr. BOYD. Will you please explain this, Mr. Shaufler?

A. This map shows the grouping for division purposes east of Chicago and the Mississippi River and west of El Paso, Texas. If there is any detailed information desired for the subdivisions, we will have a witness to explain that.

Q. Now, you had better give a little more what that map does tell you.

A. It shows the per cents that apply from the Boston group to Chicago, both east and west, or it shows the per cents from the New York group to Chicago, east and west. It shows the per cents from the Pittsburgh group. I mean it shows the per cents from the Pittsburgh group to Chicago, east and west; and it shows the divisions Cincinnati-Detroit group to Chicago, both east and west. It shows the divisions west of El Paso to California. These divisions are only on transcontinental traffic. As I said before, if you want to know or if it is desired to know the subdivisions between Chicago and El Paso, we have a witness who will be available.

Mr. ROBERTS. I don't care for that, but I would like to have a copy of the exhibit.

Mr. THOMPSON. The Texas & Pacific participates very much in transcontinental traffic, and I would like to have a copy of the exhibit.

Mr. BOYD. I will undertake to furnish copies.

Examiner BURNSIDE. If you are not supplied with copies of the exhibits you desire, just leave your name and the roads you represent and we will try to have you supplied.

Mr. Roberts, who stated that he did not care "to know the subdivisions between Chicago and El Paso" appeared on behalf of the St. Louis-San Francisco Railway. (Com. Rec. 70.) The thirteen respondents before the Commission have filed a joint bill for injunction to which Mr. Roberts and Mr. Norton have both subscribed their names as solicitors for all plaintiffs. It may be assumed that they also represented all of the respondents before the Commission, as but very few of the counsel who entered their appearances spoke before the Commission. If that is not true, then none of the respondents before the Commission other than the Southern Pacific lines is entitled to any alleged benefit from the objections interposed to evidence of the witnesses for the Orient Company; or to their cross-examination by Mr. Fred H. Wood who entered an appearance before the Commission for the Southern Pacific lines only, but who appears for all of the companies in the petition for injunction.

Counsel should not be allowed jointly to claim the benefit of matters before the Commission which aid their case before the court and then disclaim that they acted jointly before the Commission when some one of them spoke respecting matters which appear not to support their case before the court. They should not be allowed to claim that they stood united before

the Commission on the cross-examination and objections to evidence made by *one* of their number and that they stood disunited and scattered when one of their number declined to accept the offer of the witness for the applicant to furnish the division sheets.

On this subject the Commission itself said (Tr. 19) :

If it shall be found that in special instances the divisions herein prescribed operate unjustly, inequitably, or otherwise unreasonably to the injury of any carrier participating in a joint rate with the Orient, such situations may be called to our attention by appropriate proceedings and we will afford such relief as we may find warranted.

Moreover, in *New England Divisions Case*, 261 U. S. 184, 199, this Court, speaking through Mr. Justice Brandeis, said:

That there is no constitutional obstacle to the adoption of the method pursued is clear. Congress may, consistently with the due process clause, create rebuttable presumptions, *Mobile, Jackson and Kansas City R. R. Co. v. Turnipseed*, 219 U. S. 35; *Lindsay v. Natural Carbonic Gas Co.*, 220 U. S. 61; and shift the burden of proof, *Minneapolis & St. Louis R. R. Co. v. Railroad and Warehouse Commission*, 193 U. S. 53. It might, therefore, have declared in terms, that if the Commission finds that evidence introduced is typical of traffic and operating conditions, and of the joint rates and divisions of the carriers of a group, it may be accepted as *prima facie* evidence bearing upon the proper

divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions. For only in that way could the task be performed. As pointed out in *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 579, serious injustice to any carrier could be avoided by availing of the saving clause which allows anyone to except itself from the order, in whole or in part, on proper showing.

V.

THE ORDER DOES NOT COMPEL THE STRONG RAILROADS TO SUPPORT THE WEAK.

The bill alleges (Tr. 6) that the Kansas City, Mexico & Orient is—

* * * a railway system which was improvidently built and the construction of which would not be authorized to-day. * * *

In the District Court counsel for the plaintiffs (appellees here) filed a brief in which they argued that the order is—

* * * an award of the Interstate Commerce Commission of money of the plaintiffs to two railway companies after they had defaulted in a loan of \$2,500,000 of Government money made to them by the Commission. (Br. 1.)

And again:

The theory of the Commission as it appears in the decision and order in this case (Kansas City, Mexico & Orient Division, 73 I. C. C.

319; bill p. 13) is that under the Transportation Act of 1920 it has authority to take up in its arms weakling railroads and nourish and support them out of the earnings of the stronger carriers. (Br. 3.)

And again:

It is unnecessary to look to Russia to furnish startling motions of the distribution of the property of those who have among those who have not. * * * By a continuation of calculations incomprehensible to us this purely bolshevistic conclusion was reached. (Citing testimony of the witness Shaufler, Br. 21.)

And again:

What put in the head of the Commission the hitherto unheard-of idea that Congress had in the language quoted vested in it a power clearly forbidden by the Constitution and thus far never exercised except in Mexico and Russia—that is too much even for our imagination. (Br. 50.)

In another brief separately filed in the District Court by counsel for the St. Louis-San Francisco Railroad Company the same alarming view was taken, thus:

It was and will be said again that this *seizure of earnings* for the purpose of subsidizing the Orient was done "to foster public interest." A highwayman who takes my purse is nevertheless guilty of a crime, though he may unctuously announce that the contents are to be used for public charity. * * * The manner and method which the Com-

mission adopted in seizing the earnings of the petitioners for the purpose of subsidizing the Orient conclusively demonstrate that the relative amount and cost of the service, respectively, under the joint rates were wholly ignored in determining the proportion of the joint revenue which the Orient should have.

These alarming views of the counsel which were orally argued with an excited fervor appear not to have been without effect on the minds of the concurring members of the learned District Court; for in holding the order null and void Circuit Judge Lewis said (288 Fed. Rep. 113; Tr. 46):

The transportation act discloses no intention to vest the commission with power to relieve the necessities of weaker lines by imposing the burden upon its connections, simply because they are able to bear it. It exhibits a contrary purpose in section 422 adding section 15-a, to the Interstate Commerce Act because that policy would tend to bring all carriers to the same level in earnings and there would be no necessity for loans and no fund probably could be recovered for making them.

This view of the statute is not in accord with the opinions and judgments of the United States District Court and of this Court in the so-called *New England Divisions case*, 282 Fed. Rep. 306, affirmed 261 U. S. 184.

Both opinions in that case were before the District Court in this case. The only reference to the *New England Divisions case* in the opinion of the District

Court was to the footnote containing the words "Papers on the Commission files are not a part of the record in a case, unless they are introduced as evidence" (288 Fed. Rep. 115). Both opinions in the *New England Divisions case* were put out of the instant case with the statement "Neither side claims that the *New England Divisions case* is controlling or even helpful here." (288 Fed. Rep. 114.)

Quickly the counsel for the United States filed a petition for rehearing (Tr. 56) urging that "The opinion and judgment of the United States District Court for the Southern District of New York * * * and the opinion and judgment of the Supreme Court of the United States * * * which affirmed the judgment of the District Court, were not sufficiently considered." (Tr. 56.)

That counsel for the Government did rely on the two opinions in the *New England Divisions case*, both of which were before the District Court in the instant case, is shown by court documents on file with the District Court and set forth in the Government's petition for rehearing thus (Tr. 57):

The sentence "Neither side claims that the *New England Divisions case* (66 I. C. C. 196, 282 Fed. 306) is controlling or even helpful here" is not sustained by the documents in the record.

On the hearing of the application for temporary injunction, September 30, 1922, the main argument of counsel for the United States in opposition to the application was that the opinion of the District Court, South-

ern District of New York (Circuit Judges Hough, Manton, and Mayor all concurring), was persuasive against the plaintiffs in the instant case; and the fact was mentioned and emphasized that while plaintiffs in this case, on that hearing, had filed a brief of 72 printed pages they studiously avoided any reference thereto. The transcript of the stenographer's notes will disclose that counsel for the Government read at almost undue length from Circuit Judge Manton's opinion on both hearings.

The statement by this court that "Neither side claims that the *New England Divisions case* is controlling or even helpful here" was certainly not the impression of counsel for the plaintiffs, who, in their elaborate brief on the final hearing, reviewed at length the stenographer's notes of the argument previously made by counsel for the United States, with respect to which they say (p. 54):

"In the New England case, upon which counsel for the United States relied in oral argument (Argument, p. 84) and upon which we rely even more confidently, the Commission showed in its decision much evidence, and the United States District Court supported its order because there was so much well-considered evidence in the record that the order could not be held arbitrary."

Moreover, after two oral arguments at the Bar the Court generously allowed counsel for the United States to file a short brief. Point VI, the last paragraph, is as follows:

"The opinion of the District Court for the Southern District of New York (Circuit Judges

Hough, Manton, and Mayer) is confirmatory of all that the Commission did in the instant case. *Akron, Canton & Youngstown Railway Co. v. United States*, 282 Fed. Rep. 306.

The preliminary injunction should be dissolved and the bill should be dismissed."

The final hearing was held at Denver, November 27, 1922. The appeal in *The New England Divisions case* was not argued before the Supreme Court of the United States until January 11, 1923. The final opinion and judgment of this Court was announced on February 19, 1923, or more than two months after the instant case was argued and submitted. While both the main opinion and the dissenting opinion in the instant case indicate that the opinion of this Court was before the District Court when it decided this case, it could not well be said that "Neither side claims that the *New England Divisions case* is controlling or even helpful here," as neither side was ever heard on the subject after this Court decided that case.

It is respectfully submitted that the opinion of the Court neither correctly states the argument of counsel nor gives sufficient consideration to the opinion of the this Court in *The New England Divisions cases*.

Moreover, one day after the permanent injunction was issued in the instant case, the United States District Court for the Eastern District of Texas (Circuit Judges Walker and King and District Judge Foster) sustained the so-called "Recapture Clauses"

in case *Dayton Goose-Creek Railway Co. v. United States*, 287 Fed. Rep. 728. That opinion was also cited to the District Court in the petition for rehearing without avail.

In answer to the petition for rehearing the carriers conceded that the counsel for the Government relied on the opinions in the *New England Divisions case* and the opinion of the District Court in the *Dayton Goose-Creek case*. Indeed, in answer to the statement of the District Court that neither side relied on the opinions in the *New England Divisions case*, counsel for the carriers in the instant case stated "we relied upon it even more confidently than counsel for the Government did, not as decisive of any legal question before this court, but as illustrating that the Commission knew perfectly well how to try a division case." (Tr. 64.)

In the *New England Divisions case* the argument was advanced that the order was in the nature of a division of property and a transfer of money. In the *Recapture Clause case* the argument of the nineteen *amici curiae* was that the effect of the "recapture clauses" was "income-appropriation." In the instant case appellees argue that the order is "a seizure of earnings" and "an award of money," all based on the alleged erroneous principle that the Transportation Act was so designed as that the strong shall carry the weak.

These arguments were so overwhelmingly and conclusively rejected in the *New England Divisions case* and the *Recapture Clause case* as to dispense

with further argument on the subject. In both of those great opinions the needs of the weaker lines were recognized expressly and in the latter case the Chief Justice said "The recapture clauses are thus the key provision of the whole plan."

VI.

CONCLUSION.

The evidence was adequate to sustain the order. The final decree should be reversed with directions to the District Court to dismiss the bill for want of equity.

JAMES M. BECK,

Solicitor General.

BLACKBURN ESTERLINE,

Assistant to the Solicitor General.

CLIFFORD HISTED,

Special Assistant to the Attorney General.

APPENDIX A.

Section 20 of the Act to Regulate Commerce, approved February 4, 1887 (Ch. 104, 24 Stat. 379, 386) provided:

"That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipment; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the Com-

mission may require; and the said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept."

Section 7 of the Act to Regulate Commerce, approved June 29, 1906 (Ch. 3591, 34 Stat. 584, 593) provided:

"That section twenty of said Act be amended so as to read as follows:

"SEC. 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improve-

ments; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

"Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, and shall be made out under oath and filed with the Commission, at its office in Washington, on or before the thirtieth day of September then next following, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission for making and filling the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority

to require said carriers to file monthly reports of earnings and expenses or special reports within a specified period, and if any such carrier shall fail to file such reports within the time fixed by the Commission it shall be subject to the forfeitures last above provided.

" 'Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

" 'The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

" 'The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

" 'In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its

authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

" Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment.

" Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

" That the circuit and district courts of the United States shall have jurisdiction, upon the application of

the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them.' "

Paragraph (7) of the Act approved June 29, 1906, was amended by the Act approved February 25, 1909 (Ch. 193, 35 Stat. 648, 649), so as to read as follows:

"Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment: *Provided*, That the commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved."

Section 14 of the Act entitled "An Act to create a Commerce Court," etc., approved June 18, 1910 (Ch. 309, 36 Stat. 539, 555), provided as follows:

"That section twenty of said Act to regulate commerce, as heretofore amended, is hereby amended by striking out the following paragraph:

"Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, and shall be made out under oath and filed with the commission, at its office in Washington, on or before the thirtieth day of September then next following, unless additional time be granted in any case by the commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the commission for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The commission shall also have authority to require said carriers to file monthly reports of earnings and expenses or special reports within a specified period, and if any such carrier shall fail to file such reports within the time fixed by the commission it shall be subject to the forfeitures last above provided."

"And by inserting in lieu of the paragraph so stricken out the following:

"Said detailed reports shall contain all of the required statistics for the period of twelve months ending on the thirtieth day of June in each year, or

on the thirty-first day of December in each year if the commission by order substitute that period for the year ending June thirtieth, and shall be made out under oath and filed with the commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the commission so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the commission, it shall be subject to the forfeitures last above provided.'"

Section 435 of the Transportation Act of 1920 amended the fifth paragraph of section 20 of the

Act to regulate commerce as follows (Ch. 91, 41 Stat. 456, 493, 494):

"The fifth paragraph of section 20 of the Interstate Commerce Act is hereby amended to read as follows:

"(5) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys. The Commission shall, as soon as practicable, prescribe, for carriers subject to this Act, the classes of property for which depreciation charges may properly be included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. The carriers subject to this Act shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses. The commission shall at all times have access to all accounts, records, and memoranda, including all documents, papers, and correspondence now or here-

after existing, and kept or required to be kept by carriers subject to this Act, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers. This provision shall apply to receivers of carriers and operating trustees. The provisions of this section shall also apply to all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, kept during the period of Federal control, and placed by the President in the custody of carriers subject to this Act.'"

Paragraph (13) of Section 16 of the Act to Regulate Commerce (renumbered, Ch. 91, 41 Stat. 492), as amended by Section 13 of the Act approved June 18, 1910, entitled "An Act to create a Commerce Court," etc. (Ch. 309, 36 Stat. 539, 555), provides:

"The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the com-

mission, and shall be received as *prima facie* evidence of what they purport to be for the purpose of investigations by the commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the commission's seal, shall be received in evidence with like effect as the originals."





Office Supreme Court, U.
FILED
JAN 31 1924
WM. R. STANSBURY
CLERK

Orient Divisions Case.

No. 456.

In the

Supreme Court of the United States

October Term, 1923.

THE UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, *Appellants*,

vs.

ABILENE & SOUTHERN RAILWAY COMPANY, THE
ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY, THE CHICAGO, ROCK ISLAND
& PACIFIC RAILWAY COMPANY ET AL.

BRIEF AND ARGUMENT

on Behalf of William T. Kemper, Receiver of the
Kansas City, Mexico & Orient Railroad Company
and Kansas City, Mexico and Orient Railway
Company of Texas, Interveners.

CLIFFORD HISTED,
Kansas City, Missouri,
E. A. BOYD,
Wichita, Kansas,
Solicitors for Interveners.



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CASE CITED.

New England Divisions Case, 261 U. S. 184.24, 27

In the
Supreme Court of the United States
October Term, 1923.

No. 456.

THE UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, *Appellants*,
vs.

ABILENE & SOUTHERN RAILWAY COMPANY, THE
ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY, THE CHICAGO, ROCK ISLAND
& PACIFIC RAILWAY COMPANY ET AL.

BRIEF AND ARGUMENT

on Behalf of William T. Kemper, Receiver of the
Kansas City, Mexico & Orient Railroad Company
and Kansas City, Mexico and Orient Railway
Company of Texas, Interveners.

INTRODUCTION.

This case grows out of an order of the Interstate Commerce Commission which granted to the Kansas City, Mexico & Orient Railroad (William T. Kemper, Receiver), and the Kansas City,

Mexico & Orient Railway of Texas an increase in the divisions of through rates, fares and charges, under Section 15(6) of the Interstate Commerce Act. These railroads are under one management and constitute the Orient System. They are referred to throughout the proceedings as the Orient and will be so designated in this brief and argument. The Orient is the vitally interested party in this case. It was an intervenor in the court below, filed an intervening answer and participated in the hearing in the case below, and is a party in this proceeding by service and acceptance of notice of appeal.

We could add nothing to the discussion of the Transportation Act as applied to the facts in this case contained in the able briefs for the United States and for the Interstate Commerce Commission. We, therefore, will confine ourselves chiefly to an argument and discussion of the facts.

We believe that we can demonstrate that there was ample evidence to sustain the order of the Interstate Commerce Commission. While this, as we understand, is the full length to which the Court will go in its review, we, nonetheless, invite the fullest consideration of the correctness of the opinion of the Commission upon the facts produced, because we contend that not only was there before the Commission abundant testimony to sustain its order, but that its judgment was manifestly just and right and the only one that could have been properly entered under all the facts and circumstances of the case.

I.

**The Court Erred in Respect to the Degree of Proof
and the Definiteness of the Finding Required
to be Made by the Commission.**

The view of the court below was that the order must be founded upon a definite finding of fact to be made by the Commission and that this finding must be supported by evidence.

We will presently show that this requirement is met by the proof which was before the Commission, but, nonetheless, we advance the proposition that the lower court takes an extreme view of the burden resting upon the Commission and its view involves a misconception of the requirement of the statute. It is certainly not the letter of the law which reads:

“Whenever, after full hearing, upon complaint or upon its initiative, the Commission is of opinion,” etc.

Neither is the court's view within the spirit of the statute.

The statute deals with an administrative body confronted with the problem of so administering the railroad revenues “paid by the community” in such manner as will promote the fundamental purpose of the statute, to-wit, to enable the carriers “properly to meet the transportation needs of the public.”

In the very nature of things, this delicate and important task involves the exercise of sound judgment and discretion to a peculiar degree—

first in respect to the existing basis of division of rates; and second, in respect to changes to be made in such basis. In contrast, a judicial inquiry presents a very different situation. A court is dealing with definite facts. They have already occurred and are of a positive character. They are capable of demonstration by proof and of being found as findings of fact from the proof adduced. But there is no such analogy here. The analogy, rather, is to the power exerted by the Commission in a revision of rates. The Commission reaches a conclusion that there should be a change in rates. It reaches this opinion from consideration of many facts and circumstances. It is the conclusion of a body skilled and experienced in rate structures. It is an expert opinion, to be sure. But, it is an opinion nonetheless. It is not required that this opinion should possess the attributes of a finding, as that word is customarily employed, and the correctness of which can be tried by the usual tests of evidence. "Opinion" and "finding" are not synonymous words.

"Opinion—A judgment formed or a conclusion reached; especially, a judgment formed on evidence that does not produce knowledge or certainty."

Synonyms are "belief, conviction, etc."

"Finding—That which is found by observation or search; especially, in law, a statement of a conclusion arrived at by the judicial trial of an issue."

The Century Dictionary, Revised and Enlarged Edition.

There must enter into each, conditions and considerations which do not necessarily form any part of the other.

The law does not require the Commission's opinion to be infallible, nor to guarantee that the remedy which it prescribes to correct the conditions which it finds shall be an absolute cure. Good faith and the exercise of sound judgment in arriving at an opinion and in applying a remedy are all that are required. The conception of the law by the court below would make the Transportation Act unworkable. Every order of the Commission could be subjected to the test of strict rules of evidence and the law itself defeated.

So, in the instant case, the opinion reached by the Commission concerning the existing divisions need not have been bottomed on facts ascertained with all the definiteness and precision involved in a judicial hearing. The Commission had the right to conclude that the existing basis of divisions between the Orient and its connections was "unjust, unreasonable, inequitable or unduly preferential or prejudicial" to the Orient from facts and circumstances which need not necessarily have been sufficient to warrant a positive finding of fact in that regard as might have been required in a judicial examination. Nonetheless, having on full hearing reached that opinion, it was the statutory right and duty of the Commission to carry that opinion to its logical conclusion by changing the divisions.

The statute gives positive expression to this distinction when all that it requires is two things, i. e., (1) full hearing; and (2) an opinion of the Commission.

It cannot be presumed that this language was used in the statute illadvisedly or without a purpose. If Congress had intended to require more than this from the Commission it would have said so. Indeed, this is the proper language to use when an administrative body is required to legislate for the future conduct of the parties. This is particularly manifest from the further consideration that at all times the matter is within the continuing control of that body. Unlike a judgment, which becomes fixed and unalterable, this decision can be changed at any time that the Commission on its own initiative, or upon complaint, finds either that its order should be modified or that subsequent changed conditions have rendered the remedy no longer appropriate, adequate or needful.

And so, in recognition of this fact, the Commission in its order expressly retains control and invites any carrier to apply to the Commission for relief "if it shall be found that in special instances the divisions herein prescribed operate unjustly, inequitably, or otherwise unreasonably to the injury of any carrier participating in a joint rate with the Orient."

II.

Preliminary Observations.

1. The hearing was on the initiative of the Commission. It was not upon formal issue joined. This is a distinction manifestly overlooked by the majority opinion in the court below.

In the opinion of the lower court it was said (p. 41 of the record):

"It (Orient) was seeking relief and it suggested a plan which it believed would relieve its necessities. It made the record. The plaintiffs, aside from furnishing the statements showing the number of tons and ton-miles of freight transported on their lines and interchanged with the Orient for 1921 and the revenues therefor accruing to the Orient and to the respective plaintiffs, introduced no evidence. At the close of the proof introduced by the Orient the matter was submitted on the record without argument."

It is true that the Orient had suggested, in the statement which it filed with the Commission, a plan for adjusting divisions. That plan, however, was merely a suggestion. It was not adopted by the Commission and had no bearing, one way or another, upon the final result. The court, therefore, gives undue prominence by devoting more than three pages of its printed opinion to a discussion of a suggested plan which was never seriously considered at any stage of the proceeding by the Commission.

It is not correct to say that the Orient made the record (page 41, record). The Orient made no record in this case. The record was made by the Commission. Preliminary to the hearing, all of the carriers, including the Orient and the plaintiffs, were directed to prepare and present certain statistical data. At the hearing, all of them were invited to present whatever they had to offer, by way of evidence, argument, or otherwise, for or against the question of increased divisions.

The situation of the Orient, its operating conditions, its necessities, and all other matters germane to the subject, were not new to the Commission. It had theretofore gone into those subjects *in extenso* in connection with a prior application for a loan under Section 210 of the Transportation Act. The Commission availed itself of this knowledge and of the facts resulting from the investigation which it had made in that connection as embodied in its Finance Docket 3. Attention was called to this prior record and proceedings and the same constitutes part of the evidence in this case, although it is not included in the printed transcript of the record filed herein (see pp. 228, 229, Record A). However, two quotations from Commission's finding in the proceedings resulting in the loan are found in the record (pages 39, 40 and 56 of Record A).

2. This investigation was before an expert body peculiarly qualified to analyze the statistical data and evidence and to arrive at a correct opinion of and the correct answer to the technical

and special questions involved in the matter under investigation.

3. Ample advance notice of the investigation was given to the interested railroads and a full hearing was in fact held.

Note the order of April 3, 1922 (p. 63, Record A), setting the matter for hearing May 15th. The hearing commenced on May 15th at 9 a. m. and occupied until 1:10 p. m. the following day. There was full appearance and representation by all of the carriers concerned. Both oral and documentary evidence was used, the record comprising over 300 printed pages. The carriers fully cross-examined all the witnesses. Finally, after the Orient Railroad indicated that it had no further evidence to produce and the Commission had developed the facts so far as to it appeared sufficient, the other interested carriers were requested by the examiner to proceed, whereupon through their counsel they stated (p. 258):

"Mr. Wood: Mr. Examiner, the respondents have no evidence to offer in this proceeding. They have been severally requested to furnish to the Commission certain statistical information, and I am prepared to file at this time responses to the Commission's request, so far as the figures have already been compiled by the respondents. I understand that the preparation of some of the figures has been somewhat delayed."

Here is presented the theory on which the complaining carriers, in this case, proceeded at the hearing. They evidently looked upon it as

though it were a lawsuit with the Orient as plaintiff, and the other carriers as defendants, and the Commission the judge. Being a judge, the Commission according to their theory, was confined strictly to the case made by the parties, and if it erred, appeal would lie by means of suit. This theory, we believe, is entirely erroneous and involves a misconception both of the nature of the investigation, the power and duty of the Commission and the duty of the carriers as well. The plaintiffs in the court below are in the attitude of asking a court of equity to help them out, because they misconceived the nature of the proceedings in which they were engaged before the Commission. The Commission was searching into the facts to determine how it should perform its duty under the mandate of the Transportation Act to keep this carrier in operation in the interest of the public. Increasing the divisions of existing rates was the method under consideration. It was the duty of these carriers to render every aid to the Commission which they could, by way of evidence or otherwise, which would throw any light upon the subject of inquiry and further the purpose in hand. It was not a proper discharge of that duty to assume the attitude of a defendant in litigation and, as it were, test the question by a demurrer to the evidence and then appeal to the court if their demurrer should be overruled.

III.

Analysis of the Evidence.

The statute itself in a broad and general way indicates the scope of the investigation and the general nature of the matters and things which are to be considered by the Commission in prescribing and determining the divisions of joint rates, fares and charges.

This record shows that every factor and element indicated by the statute as a basis for an opinion and order was met by the proof and received due consideration. Let us examine these various matters in the order indicated by the statute:

First.—The efficiency with which the Orient was operated.

This, of course, was an expert question. The Commission obviously had many methods by which it could determine that matter. There, moreover, has been no suggestion even, on the part of any carrier, either before the Commission or before the Circuit Judges, or at any other time or place, challenging the efficiency of the operation of the property. Consequently, the Commission very properly said in its report (Rec. p. 14):

“No allegation of inefficient operation appears in the record against the Orient or of any of the respondent connecting lines.”

Under the circumstances, the Commission was justified in accepting as true that the property was being efficiently operated.

Second.—The amount of revenue required to pay operating expenses, taxes, and a fair return on the railway property held for and used in the service of transportation.

We invite attention to the testimony of E. H. Shauffler, General Traffic Manager of the Orient Railroad, pages 74 *et seq.* of the Record A before the Commission, and to Exhibits 1, 2, 3, 4, 5 and 6 appearing at pages 264 to 273, Record A. This testimony and the exhibits show all of the foregoing factors and demonstrates, beyond doubt, that the Orient's revenues, from rates and existing divisions, were insufficient to pay its operating expenses and taxes—let alone anything by way of return upon the invested capital. So the Commission in its report found (p. 14):

“The deficits in railway operating income for the years ended December 31, 1920 and 1921, have already been shown as \$1,407,-106.97 and \$860,740.81 respectively. According to the estimate of the Orient, the deficit for 1922 will amount to \$1,590,213. For the year ended December 31, 1920, interest was accrued amounting to \$311,526.65 of which only \$17,622.95 was paid. For the year ended December 31, 1921, interest accruals amounted to \$514,665.32, of which \$150,000 was paid, this payment being applicable to a loan of \$2,500,000 to the Receiver of the Kansas City, Mexico & Orient Railroad Company under Section 210 of the Transportation Act of 1920.”

The testimony shows various other efforts which were being made to help the situation,

among others being relief through the Labor Board by authority to reduce wages; another was making the Orient a differential line. Of course, neither of these were under the control of the Commission and differential rates could be put into effect only by cooperation of the carriers affected. These various matters are referred to in the report of the Commission (Rec. p. 14). So that it was accepted in the court below and will, without question, be conceded here, that it did become imperatively necessary that the Orient should increase its revenues.

And here we emphasize a most important point: That at no time has the Orient asked for the full statutory measure of increase in divisions which might have been awarded to it under subdivision 6 of Section 15. All it has asked and all that the Commission has attempted to secure to this railroad is such additional revenues as will enable it safely to maintain the property and continue its operation in the public service. (See Record pp. 12 and 17, also Record A, p. 123.) Nothing beyond this was asked at the hearing and nothing more is asked now. Notwithstanding the fact that upwards of \$29,000,000 have been invested in the property in the United States, neither those investors nor the Receiver are expecting to realize anything at this time from operation of the property applicable to dividends or income. In that respect they are content to forego their just demands. They do feel, however, in the public interest, that a railroad determined by the Interstate Commerce Commission to be an essential

railroad shall be permitted in the proper exercise of the powers of the Interstate Commerce Commission to realize such income from the business which it transports as will enable it to live and continue to perform its public duties.

Third.—The importance to the public of the transportation service of such carrier.

This proposition was fully developed at the hearing and permeates this record. Briefly stated, this testimony shows that The Kansas City, Mexico & Orient Railroad System was originally designed to extend from Kansas City, Missouri, through the states of Kansas, Oklahoma and Texas, and thence through the Republic of Mexico to the Pacific Ocean at Topolobampo—a distance of 1659 miles. 967 miles of the road, or approximately two-thirds of the line, have been completed and are in operation, 737 miles of which are in the United States extending from Wichita, Kansas, to Alpine, Texas. That portion of the System in the United States operated jointly by the Receiver of The Kansas City, Mexico & Orient Railroad in Kansas and Oklahoma and, in Texas, by the subsidiary corporation, the Kansas City, Mexico & Orient Railway Company of Texas, and both called herein the "Orient System," operated under a single management, is the matter of concern in this hearing. It was in reference to the needs of the System solely in the United States that the inquiry under consideration was directed. This 737 miles connects at Wichita, Kansas, with four trunk lines, the Missouri Pacific, Santa Fe, Rock Island and Frisco and at Alpine, Texas, with

the Southern Pacific System. It also forms connections with all of the other railroads, plaintiffs, in this proceeding.

The railroad was projected about 1901. Its completion was arrested by the revolution in Mexico; and the troublous times, in that Republic, ever since have been a deterrent factor in completing the enterprise. Meanwhile, following the building of the road in the United States, was the development of its territory, presenting the spectacle of change from open to closed and fenced cattle ranges, in turn supplanted by farms and still smaller individual holdings, great increase in both suburban and rural population, and the usual accompaniments familiar to all, in the development of pioneer country. Although the Orient is yet a pioneer in the United States, nonetheless the testimony and maps graphically show the absolute and sole dependence upon it by large sections of the country. While a small portion of its mileage is paralleled by other lines in Kansas and Oklahoma (most of which followed the Orient in construction), in Texas it traverses a large otherwise unoccupied territory all of which is devoted to diversified farming and cattle raising, which includes grain of all classes, broom corn, alfalfa, cotton, kaffir, cattle, horses, sheep, goats, etc. Supported by this great agricultural and stock territory are 109 towns and villages, a number of which are county seats located along the line of the road, 85 of which are served exclusively by it. This settlement which has been brought about, and the development and prosperity which they

are enjoying and hope to continue, are founded upon this utility. While some effort is made in the record, it would be difficult to estimate with any degree of accuracy the millions of dollars which have been added to the wealth of that large section of the country which is thus dependent upon the road and which have been created by its existence.

In passing upon its application for a loan under Section 210 of the Transportation Act, the Interstate Commerce Commission had investigated the importance and necessity of the Orient System as an agency of public welfare, and in its report in connection with that loan it said:

"Great interest in these applications was manifested by the communities served by the Orient lines. This concern was evidently the result of a widespread fear that if the loan should not be granted, operation of the Orient might be abandoned. It is not disputed that the Orient System, or at least that part which lies within the United States, is of essential importance in meeting the transportation needs of the public in the territory which it serves." (pp. 39, 40, 228 and 229 of Record A.)

As further showing that the Commission realized the importance of enabling the Orient to continue in operation we quote the following concluding portion of its report in the pending matter (Record, pp. 19 and 20).

"At a conference of representatives of the states in which the Orient operates, and of

connecting carriers, held since this case has been submitted, the official delegate from Texas stated that a large number of counties in his state had expressed their willingness to assess the Orient for taxation purposes at the nominal value of \$100.00 per mile. We believe that the other states should follow the lead of Texas in this respect; in fact, complete exemption from all taxes until the Orient can earn something is demanded in the public interest. We earnestly recommend this course to the respective state authorities.

It should also be stated that through the proper channels steps have been taken to route Government freight over the Orient as far as practicable."

It may be thought that we are giving undue prominence to this feature of the case. The justification, however, lies in the fact that throughout the proceeding before the Commission the burden of such defense as the railroads offered through cross-examination of witnesses and statements and innuendoes during the hearing was that the Orient Railroad ought not to have been built, but that having been built, it should be suffered incontinently to perish from off the face of the earth. What counsel would do with the wealth created in the country tributary to the Orient in consequence of its existence, to say nothing of what they would do with the thousands of people whose every hope is staked upon the continuance of the Orient, was not vouchsafed by them and remains a mystery to us.

Considered in the light of its mileage—737 miles—and the vast stretches of country which are

solely dependent upon it, the Orient System in the United States presents a unique situation, without parallel in any other part of the United States or in connection with any other railroad. It challenges, to a peculiar degree, the efficacy of the measures provided in the Transportation Act 1920 to preserve and maintain a transportation system for the people of this country. The Orient's property, its demands and needs for revenues, of course, were utilized to the Nth power by these complaining carriers in securing the rate advance, *ex parte* 74, but now those same carriers throw every obstacle within their power against the effort of the Commission to carry *ex parte* 74 to its logical and destined purpose under the Transportation Act, by securing to each carrier such fair and just division of rates as is needed to maintain the property in operation.

Fourth.—The status of participating carriers as originating, intermediate or delivering lines.

The proof shows that all of the railroads affected by the order come within each of the foregoing categories.

Fifth.—Any other fact or circumstance which would ordinarily without regard to the mileage haul entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

This is a very broad and general condition, leaving, as it manifestly should, very largely to the discretion of the Commission, what particular facts and circumstances should be embraced within

the inquiry, and how they should be ascertained. The record of the investigation conducted by the Commission shows that it approached the problem in the broadest way possible, and developed at the hearing and during the course of its investigation, every circumstance, condition or situation which might throw any light upon the subject of inquiry. Examining some of these matters in detail, it is to be observed:

Exceptional Conditions Affecting the Orient.

1. The Orient System in the United States labors under a number of disadvantages when compared with its connections. For example, as the record shows, there is no timber or coal located on the Orient from which it could obtain ties or fuel. Exhibit No. 6 (page 273 of the Record A) shows that this circumstance alone resulted in freight payments by the Orient in 1921 on fuel, ties and material necessarily brought to its own line for use and consumption amounting to \$350,155.12. Indeed, in a sense, the Orient was a victim as well as a beneficiary of the increased rates granted in *ex parte* 74. It is also true that there are no factories on the line of the railroad which manufacture material required in the operation of the property, so that all of those items again have to be transported on to the property at increased cost.

The territory served by the Orient is not adapted to finishing cattle, which results practically in a one-way movement of such freight.

This circumstance means that for every car of loaded cattle an empty car must in the first instance have been transported over the line to receive the freight. The evidence shows that 50 per cent of the cattle, moving on the Orient line, are shipped on the lower ordinary or stock cattle rate, rather than the higher beef cattle rates.

Perhaps we cannot better cover these exceptional conditions than by quoting from the traffic manager's testimony reduced to narrative form (Record A, pages 84 to 88):

"Approximately 26 per cent of traffic moving on the Orient is live stock. In the furnishing of equipment there is always an empty car haul, and in order to get the equipment from the north to the south it is in most cases necessary to handle the empty equipment approximately 700 miles, which makes the per diem an average of \$12.00 per car, which makes the operation expensive to the Orient. The bedding of stock cars is an enormous item, which is not nearly covered by the charge. The Orient is obliged to maintain feeding and resting pens in Texas, Oklahoma and Kansas, which increases switching expenses and overtime for trainmen. The empty haul movement is approximately 100 per cent of the cattle movement. The cattle movement is to the north and east. About 50 per cent move on the fat cattle rate and 50 per cent on the stock cattle rate. There is no local cattle movement on the Orient; it is delivered to some connection. The Orient handles about 80,000 bales of cotton annually. The unusual costs to the Orient from that movement is that cotton

moving into compresses is handled in any quantities, the inbound loading is light, so that it is necessary to furnish another car for the movement from the compress. This makes the use of two cars in and one car out, or the movement of three cars for one load. The percentage of cotton as compared with the total traffic is greater with the Orient than with most railroads in that territory. The movement of grain on the Orient is about 25 per cent of its traffic. There is a heavy expense for the cooperage and light repairs on cars. In many cases we spend as high as \$20.00 per car to make them fit for grain loading. There are no coal mines, timber or raw materials for supplies on the Orient. All fuel, materials and supplies necessarily must be purchased off the line, upon which we have to pay commercial freight rates."

The court below answered this evidence of exceptional conditions with the statement that

"So far as the proof discloses, that may be true also of some or all of the plaintiffs."
(Record, p. 47.)

An attempt to wipe out the evidence of these exceptional conditions by indulging in a presumption, nowhere supported by proof, or justified from anything in the record, does not meet the exigencies of this case. Neither does it recognize fairly the facts elicited by the Commission, nor the grounds upon which it had a right to found its order. We submit the court cannot ignore the testimony nor the conditions which the testimony created as applied to the Orient by a surmise that

other carriers may have similar or other operating problems or expenses. It cannot in one breath say that there is no testimony to support the Commission's order and then when the evidence is called to its attention treat it as contradicted by surmising the existence of rebuttal proof not produced. That course would not only be subversive of every principle of fairness and justice in any case, but would be particularly objectionable here because, in the first instance, it invades the exclusive province of the Commission to weigh the testimony and then seeks to overcome the admitted weight of such testimony, or, as in this case, the uncontradicted evidence.

The plaintiffs had the privilege to endeavor, at least, to combat this showing or to meet it in any other way they thought best, but they did not choose to do so. It is too late, after the hearing has been closed and the Commission has made its order, to suggest the existence of supposititious facts, which, if they had been produced, might have led to a different conclusion.

But, moreover, the suggestion of the lower court of the possible existence of exceptional conditions in respect to other carriers not only invades the province of the Commission, but begs the issue. If any other carrier is entitled to special treatment in the matter of its divisions under the provision of Clause 6 of Section 15 the way to relief is plain and open to it by application to the Commission under the statute. Not only is that true, but the Commission in its order invited any car-

rier so concerned to present its situation to the Commission for adjustment. (Record, p. 19.)

But, here, we see the court usurping the province of the Commission, and, in the absence of complaint and without the presentation of a single fact, concluding that some or all of the carriers (names not given) are entitled to special treatment with respect to division of their rates.

The evidence warranted the Commission in finding that the nature of the freight movement over the Orient line, the added burdens placed upon it and the other exceptional conditions adduced at the hearing rendered the existing divisions as a whole unfair, unreasonable and prejudicial, and that the Orient was entitled to a larger proportion of the freight rate than it was receiving.

But the state of mind of the learned judges who decided this case below is indicated in their observation that in an investigation determining division of existing rates

"the controlling inquiry must necessarily be directed to ascertaining the amount and cost of service to each of them." (Record, p. 47.)

They say (Record, p. 47):

"So that it seems obvious to us that the phrase in paragraph 6 so much relied upon intends that all of the subjects named for consideration have application only where the inquiry goes to the extent of both fixing and dividing the joint rates; and that where it extends only to a division of existing rates, some of the things named for consideration

by the Commission have no relevancy to or weight in determining what the new divisions shall be. In such an investigation we think the controlling inquiry must necessarily be directed to ascertaining the amount and cost of service to each of them."

Here is to be remarked the curious circumstance that the interpretation of the court below not only rejects every single element recited in the statute to be considered in revising divisions, but introduces as the sole and conclusive factor an element not even mentioned in the statute.

The opinion of this court in the New England Divisions case so completely demonstrates the erroneous conception of the law manifested by the court below that it would serve no purpose for us to further pursue the argument.

2. Another exceptional condition unfavorably prejudicial to the Orient System is the state in which it was left upon termination of Federal control. The proof shows that during Federal control all freight solicitation was abandoned and a large percentage of tonnage in which the Orient had previously participated as an intermediate carrier was handled via other lines and diverted from the Orient. Very little, if any, through business during Federal control, was handled over the Orient, except that it was utilized in hauling empties and non-revenue producing freight. When the property was returned to its owners it came with many attendant disadvantages and in much different condition than when it was turned

over to the Government. It had no corps of freight solicitors and had no friendly connections. Its former customers had been weaned away from it and it was compelled to begin the arduous process of building up its through business anew. All of the years of accumulated friendships and connections had been lost. This circumstance is adverted to by the Commission in its report. (Record, p. 12.)

3. Another burden unfairly placed upon the Orient was the refusal of its connections to adjust divisions based upon established arbitrariness to meet rate reductions which went into legal effect after the division agreements had been made.

(See testimony of Mr. Lane, Record A, pp. 234, 235, 238 and 239.)

The Commission called attention to this circumstance in its report. (Record, p. 17.)

IV.

The Commission's Opinion and Order.

The Commission in its report, after a careful analysis of the operating figures and evidence, said (Record, p. 18):

"It is apparent, however, that the Orient has not received and is not receiving the share of the revenue within the group in which it is included to which it is properly entitled on basis of the amount and character of service performed."

In its investigation and order the Commission dealt with the subject comprehensively. All of the carriers affected by the order are in the Western Rate Group and were all participants in the freight rate advance granted by the order in *ex parte* 74. As was said by one of our associates in his brief in the court below, the Commission did not attempt to fix particular divisions of individual rates, as such. The interchange traffic between the Orient and each plaintiff was considered as a unit; the Commission accorded blanket treatment to all divisions of all joint rates between the Orient and each plaintiff. The question decided was whether those joint rates, taken together, were on the whole reasonably and justly divided between the Orient and the plaintiff; that is to say, whether the aggregate revenue accruing to the Orient and the plaintiff from joint rates was fairly divided between them.

Continuing our argument, we call attention to the fact that the revenue and expenses of the Orient, as well as of all of the other carriers, were before the Commission. The investment in the Orient property and the amount of revenue required by it in order to pay its operating expenses are fully shown and are admittedly inadequate. Exhibit No. 16 (pages 294, 295 of Record A) shows the result of the Orient's revenues if present divisions were increased by certain percentages, using the revenues for 1921 as the basis.

With all of this evidence before it, it became a matter of expert judgment to apply the facts and work out a rule of such equitable and just

division of the rates as in the opinion of the Commission would secure in this case, particularly, the primary object of the Transportation Act, *to-wit*, the continuance of the Orient in transportation service.

As suggested in the New England Divisions case, suppose that the Commission had disposed of this matter of divisions at the time it granted the increase of rates to the plaintiffs in *ex parte* 74; that all had been contained in one order. Do not the facts of record in this case show that the Commission would have been justified in making the division of the rates that it has made? What single element would have been lacking as a necessary predicate to such order? If the rate increase and the divisions had been the subject of a single inquiry, there would have entered into the judgment of the Commission these primary considerations—on the one hand there were a group of prosperous carriers whose independent needs, alone considered, did not entitle them to anything like the advance in rates proposed, and who, if the matter was not controlled through divisions, would receive an unreasonably large return. On the other hand, was the Orient System suffering under exceptional conditions, sadly in need of revenue—to such an extent that it was imperative that it should be increased if it should continue to operate. What could or should the Commission have done in performance of its duty to insure adequate transportation service to the country dependent upon the Orient System? What was the just, reasonable and equitable thing to do?

The questions answer themselves, and yet, that is all there is to this case. The rule is no different, and the considerations are in no respect changed because the question of divisions of the rates came up for disposal subsequent to the time the rates were fixed.

V.

Statistical Information Before the Commission.

In its opinion the court below declares, in effect, that there is no testimony to support the Commission's order except "it can be gleaned from the exhibits." (See Record, p. 42.)

This statement in the opinion compels the observation that the court entirely overlooked the oral testimony comprising some 194 pages of the printed record and which we have, in a general way, outlined in the foregoing portion of our argument. In some respects this testimony was explanatory of exhibits. In other particulars it was new matter bringing to the attention of the Commission conditions and circumstances not shown by the exhibits at all, but all of which must be read in connection with and as forming a part of the whole case before the Commission.

Furthermore, the court below conceived that there were substantially only two exhibits worthy of consideration, namely: Exhibits 25 and 26. (See court's opinion, p. 43 of the Record.) The conclusive answer to this last observation is a brief digest of the statistical and account-

ing information contained in the voluminous record of exhibits appearing in Record A. During the presentation of these exhibits we shall point out many important matters ignored by the lower court in its consideration of the case, and further direct attention to the circumstance that its own analysis of Exhibits 25 and 26 involves a misconception of the facts and a grossly erroneous inference therefrom.

The record shows that the Commission had before it and considered in the problem certain statistical information which may be briefly recapitulated as follows:

1. Detailed statement of revenues and expenses of the Orient System for the year 1917 (prior to Federal control) 1920 (following Federal control), and for the year 1921, and the first three months of 1922.

(See Ex. 1, pp. 264-266 of Record A.)

2. Statement showing the approximate decreases in revenue for the year 1922 to be anticipated, due to reduction in rates which went into effect on January 1, 1922.

(See Ex. 2, p. 267, Record A.)

3. Statement similar to Exhibit 1 except that it shows allocation of revenues and expenses to freight and passenger service for the years 1920 and 1921.

(See Ex. 3, pp. 268, 269, Record A.)

4. Estimated revenue needs and expenses for the year 1922, showing a deficit to be anticipated of \$1,740,213.

(See Ex. 4, pp. 270, 271, Record A.)

The Commission in reviewing this exhibit deducted the interest on the Government loan, \$150,000, making the anticipated operating deficit \$1,590,213. (See p. 14, Record.)

5. Statement showing a reduction in operating expenses which would follow a favorable action by the United States Railroad Labor Board on pending application by the Orient to reduce wages.

(See Ex. 5, p. 272 Record A.)

6. Statement showing all fuel, ties, and store stock material purchased in 1921, freight charges and amount paid for freight in excess over 1917, due to increased freight rates, and also showing the total freight which the Orient was compelled to pay to transport these needed commodities to its use.

(See Ex. 6, p. 273, Record A.)

7. Statement showing loads originating on Orient lines and delivered to connections during 1921 by months. This also shows percentages which each one of the connections received of the total loads.

(See Ex. 7, pp. 274, 275, Record A.)

8. Statement showing total loaded cars received from connections in 1921.

(See Ex. 8, p. 276, Record A.)

9. Comparative statement of investment in road and equipment of the Orient System December 31, 1920, 1921.

(See Ex. 16, p. 290, Record A.)

10. Exhibit 17 (p. 291, Record A) is a compilation submitted to the Commission prepared from the Railway Age, February 25, 1922, which was taken from the annual reports filed by the Railroads with the Interstate Commerce Commission. The net operating income and deficit of 195 roads were analyzed. From this it appeared that 152 showed large operating income, that 43 show net deficit and that the deficit of the 43 could have been made up by taking slightly in excess of .02 per cent of the net earnings of the strong lines. This same calculation is carried forward with reference to the 39 roads who were originally respondents to the April 3rd, 1922, order of the Commission.

The showing is again carried forward with respect to the plaintiffs in this case (omitting Abilene & Southern and Clinton and Oklahoma Western).

Note.—In the preparation of this table, the Gulf, Colorado & Santa Fe was considered part of the Santa Fe System and the Wichita

Falls and Northwestern was treated as part of the M. K. & T.

(See pp. 291, 292, 293, 378 to 387 inc., Record A, the latter pages being a detail of the exhibits.)

11. Exhibit 18 is a memorandum showing the effect of certain suggested percentage increases to the Orient freight revenues based upon the year 1921.

(See pp. 294, 295, Record A.)

12. Exhibit 19 (p. 296, Record A) is a statement showing current assets of the Orient System as of April 1, 1922, from which it will be observed that there was at that date net cash available \$347,835.74. The auditor states there was to be considered the fact that during the previous three months the Orient sustained a deficit of \$224,067.47. It is not strange that his prediction of continued operation under the circumstances was somewhat pessimistic. This was so apparent to the Commission itself that oral arguments and briefs were not insisted upon and the Commission proceeded with all expedition in rendering its opinion in the case. Record A, pp. 262, 263, shows that this was not a tentative report case, that counsel for both sides waived briefs, waived oral argument and submitted the case upon the record as made.

13. Exhibit 20 (p. 296, Record A) is a table of operating revenues, expenses and payrolls for the year ending December 31, 1921, and exhibiting

operating ratios, from which it will appear that the operating ratio of expense to revenues for the system was 111.63.

14. Exhibit 21 (pp. 298 to 311 inc., Record A) is the application which the Orient System filed and which started the investigation by the Commission.

15. Exhibit No. 22 (p. 312, Record A) (placed in the record by the plaintiff carriers) is a statement of railway operating revenues, expenses, and income of the Orient System for the years commencing with 1903 and ending with 1920.

16. Exhibit 24 (pp. 313 to 325, Record A) is a statement compiled by the Orient pursuant to the order of the Commission of April 3, 1922 (hereinafter adverted to) showing ton miles, revenue and revenue per ton mile accruing to all parties from all forwarded traffic for the year 1921. (See pp. 313-317, Record A.) And a similar statement of traffic received by the Orient. (See pp. 317-322, Record A.) And a similar statement of intermediate traffic. (See pp. 322-325, Record A.)

17. Exhibit 25 (p. 326, Record A) is a recapitulation of freight delivered to connecting lines for the year 1921 and Exhibit 26 (p. 327, Record A) is a similar recapitulation of traffic received.

Exhibit 24 (Record A, p. 322) shows the traffic which the Orient handled as an intermediate carrier and the revenue of \$887,611.83 which resulted to the Orient therefrom. In the preparation of Exhibit 25 it was necessary to include this

intermediate traffic because this traffic was delivered by the Orient to connecting lines.

In Exhibit 26 it was necessary to include this intermediate traffic because that traffic was delivered to the Orient by connecting lines. This resulted in the duplication of the revenues to the amount above named. This duplication in these exhibits was specifically shown by witness, Kelly, in his testimony before the Commission. (pp. 251, 252, Record A.) The failure to observe this led to a very serious error by the lower court as we shall presently point out.

18. Exhibits 27 to 42 inclusive (pp. 328 to 376, Record A) were submitted by the plaintiff carriers in compliance with Commission's order of April 3, and show the same information which the Orient's Exhibits 24, 25 and 26 heretofore referred to disclose, and corroborate the Orient's exhibits.

From Exhibits 25 to 42 inclusive is shown all of the revenue which accrued from interchange business and how it was divided among all interested plaintiff carriers.

The lower court said:

"There is no evidence in the record as to what the divisions of tariffs between the plaintiffs or any of them, and the Orient were, unless those facts necessary as a basis to support the Commission's order can be gleaned from the exhibits." (p. 42, Record.)

If the court means by the foregoing to say that the division sheets were not in evidence, the

statement is true. Any implication, however, that the absence of the division sheets left any uncertainty as to the actual divisions of the revenues between the Orient and its connections is erroneous. The proof established in a much more satisfactory way the divisions between the carriers from interchange traffic than could possibly have been shown by the production of the division sheets—to say nothing of the enormous and useless accumulation of the record that such a production would have involved.

As we have pointed out, the Commission treated this problem in a comprehensive way. It looked to the ultimate result, the amount of revenue derived from the freight in its entirety and the amount respectively received by the participating carriers based upon the existing divisions.

Suppose, by way of illustration, that in addition to the data disclosed by these exhibits there had been produced

- a—Every freight tariff.
- b—Every way-bill.
- c—Every division sheet showing the divisions of the joint rates in each tariff.

These would have added nothing whatever to the showing which has been made. It would have been surplusage pure and simple. The Commission could not have obtained any information from any or all of the foregoing three suggested items that was not expressly before it.

At the risk of seeming to belabor the argument, we observe that the division sheets are of no probative value in respect to the matter before the

Commission. What the Commission was interested in was the practical result, how the joint business between the Orient and its connections worked out in dollars and cents as applied to the traffic that was actually handled, not on a theoretical basis. Therefore, when they had before them the ultimate facts, why should the record be encumbered with the details that went to make up those ultimate facts?

19. In addition to all of the foregoing exhibits, there were before the Commission to aid them in their investigation the annual reports of the Orient and of each of the plaintiff carriers for the year 1921. Attention was called to these reports at the hearing. (See pp. 73, 74, Record A.)

Conclusion From Statistical Data.

It is obvious that the problem of weighing and considering this mass of testimony, determining what it establishes and what action should be taken on the opinion reached, involved expert knowledge to a peculiar and special degree. The Commission considered the evidence from many angles, applied numerous tests, none of them in and of itself perhaps decisive, but all of them directed to the same ultimate conclusion, to-wit, the fairness and justness of the divisions and the remedy which should be applied by the Commission on the facts so developed. The lower court properly observed:

"We appreciate the fact that the ability of the Commission to make proper deductions

and conclusions from statistics embodied in these exhibits, with which it is their duty to constantly deal, is far greater than ours." (Record, p. 44.)

The Commission employed several units of comparison developed, as it said in its report, from its previous experience in matters of this character. For example, an equated ton-mile and again car-mile unit, and still another unit represented by the train-mile. It is shown in its report how these are derived. The Commission recognized the fact that it was not dealing with an exact science because it says (p. 15 of the Record):

"It is, of course, understood that the reduction of gross earnings or expenses to units of this character does not produce absolutely correct results, but where the same method is used in all cases the results afford a reasonable basis for comparison."

After an elaborate table compiled from this statistical information adverted to, the Commission in its report (p. 17 of the Record) makes the following observation:

"The general result is that while the Orient sustained a deficit in its net railway operating income of 69c per train-mile, all of its connections received income ranging from 30c per train-mile in the case of Galveston, Harrisburg & San Antonio to \$1.84 per train-mile in the case of the Fort Worth & Denver City."

Surely this demonstrates two things: First, that there was evidence before the Commission on which those skilled in that line of inquiry could make the findings adverted to; and, second, that there must have necessarily been inequality and injustice in the divisions inasmuch as the Orient was the only one that sustained a deficit.

But the Commission did not conclude its investigation at that point. It went farther and refers to other calculations. The record does not show what those calculations were and there is no such requirement, and we apprehend that it is no more incumbent upon the Commission to put upon the record its process of reasoning in all of its details than it is required from any other examining body to do such a thing. It is enough to say that it made calculations, and as a result of those calculations substantially confirmed the same result pointed out in the immediately preceding part of its report, the same result as shown on its tabulations.

In short, from whatever angle it viewed this evidence, and in whatever way it pursued its calculations, it invariably reached the same conclusion stated (page 17 of the Record) by it as follows:

"The disparity of 41 per cent in the case of freight service and 75 per cent in the case of passenger service would seem to indicate that the passenger fares and freight rates and divisions accorded this carrier are not sufficient to meet even the maintenance, traffic, transportation and general expenses properly to be charged against either the freight or passenger traffic, to say nothing of taxes,

equipment rental and a fair return on the property investment used in the service. As stated above, however, the Orient is seeking only such revenue as will enable it to operate the road and is asking nothing for its security holders."

And finally, to conclude (p. 18 of the Record):

"It is apparent, however, that the Orient has not received and is not receiving the share of the revenue within the group in which it is included to which it is properly entitled on basis of the amount and character of service performed."

VI.

Analysis of the Evidence Made by the Court Below.

While recognizing the superior qualifications of the Commission to pass upon problems of this kind, and while disclaiming any purpose to review the weight of the testimony, nevertheless we submit that that is essentially just what the lower court did in this case. The court practically concludes that the deductions of the Commission from this admitted record are erroneous.

On page 43 of the record the court said:

"Comparing the rate per ton-mile received by the Orient with that received by all of the thirteen connecting carriers on all of their interchange business with the Orient for the year 1921, it appears that the rate to the Orient on that basis is slightly in excess of

the average to all of the connecting carriers on the same basis; that is to say, the Orient received .0147c per ton-mile, while the average received by all of the thirteen connecting carriers was .012c."

The point which the court then makes as established by the foregoing statement is:

"It received a higher ton-mile rate, both on traffic which it originated and also on traffic delivered to it by plaintiffs, than they received. Its ton-miles were less than the ton-miles of all of the plaintiffs in 1921 on the interchange traffic, and yet it received for its services \$635,000.00 more than the total received by plaintiffs."

The figures stated by the court are not quoted from the record, but are the evident result of an independent calculation made by the court from the exhibits. Furthermore, it is shown to have been compiled by the court from two exhibits only. Exhibits 25 and 26. The evident method was to consolidate the totals of the two exhibits and divide the ton-miles into revenue. This method of calculation, however, overlooked the fact that 89,058,723 ton-miles, \$887,611.83, covering the intermediate traffic, was duplicated in the two statements. Exhibit 25, which covers traffic delivered to connecting lines, included traffic forwarded from points on the Orient as well as the intermediate traffic. Exhibit 26, which covered traffic received from connecting lines, includes traffic destined to points on the Orient line and

also the same intermediate traffic.

Had the court considered in this connection the testimony of witness Kelley, in explanation of these exhibits (Record A, pp. 251-252), it would have found that these exhibits contain a duplication of Orient revenues, and the reason therefor, as applied to intermediate traffic. It would have found that the intermediate traffic revenues which are duplicated amount to \$887,611.83, and that instead of the Orient receiving from this interchange business \$634,841.16 (which for brevity is stated by the court at \$635,000) more than its connections, it received \$252,770.67 less than its connections on this business.

The following tabulations make this clear:

CALCULATIONS AS MADE BY THE LOWER COURT.

	ORIENT			CONNECTING LINES		
	Ton-Mile	Revenues	Revenue per Ton-Mile	Ton-Mile	Revenues	Revenue per Ton-Mile
Exhibit No. 25. Traffic delivered to connecting lines, i. e., traffic forwarded from stations on the Orient and all intermediate traffic received from all connections.....	144,461,736	\$2,295,582.36			161,566,199	\$1,941,880.01
Total.....						
Exhibit No. 26. Traffic received from connecting lines, i. e., traffic destined to stations on the Orient and all intermediate traffic delivered to all connections	132,300,975	\$1,779,504.62			126,183,546	\$1,498,365.81
Total.....	276,762,711	\$4,075,086.98	.01472		287,749,745	\$3,440,245.82
Orient Revenue (court figures).....		\$4,075,086.98				
Connecting Lines Revenue (court figures).....		3,440,245.82				
Excess Revenue received by Orient, as per court figures.....		\$ 634,841.16				

	ORIENT		CONNECTING LINES	
	Ton-Mile	Revenues	Revenue per Ton-Mile	Revenue per Ton-Mile
Exhibit No. 25. Traffic delivered to connecting lines, i. e., traffic forwarded from stations on the Orient and all intermediate traffic received from all connections.....	144,461,736	\$2,295,582.36		161,566,199 \$1,941,880.01
Exhibit No. 26. Traffic received from connecting lines, i. e., traffic destined to stations on the Orient and all intermediate traffic delivered to all connections.....	132,300,975	\$1,779,504.62		126,183,546 \$1,498,365.81
Total.....	276,762,711	\$4,075,086.98		287,749,745 \$3,440,245.82
Deduct amount of intermediate traffic * (as shown in Exhibit 24, p. 322), which is duplicated in Exhibits 25 and 26.....	89,058,723	\$ 887,611.83		
Net Total.....	187,703,988	\$3,187,475.15	.01698	287,749,745 \$3,440,245.82 .01196
Orient Revenue				
Connecting Lines Revenue				

Excess Revenue received by Connecting Lines..\$ 252,770.67

*By intermediate traffic is meant traffic originating on a line other than the Orient, destined to a line other than the Orient, the Orient performing a service from the junction at which received to the junction at which delivery is made to its connection.

The foregoing method of considering the proof was original with the lower court. It was not adopted by the Commission.

But the court says (Record, p. 43):

"We think the record shows no better guide on that inquiry."

Curiously enough, therefore, the very method and calculation adopted by the court below vindicates the opinion of the Commission and the order increasing the divisions. But for the error in its figures due to the duplications of intermediate traffic pointed out, the calculations of the court on the per ton-mile rate demonstrate that the divisions to the Orient were unfair, unjust and unreasonable, and this from the two Exhibits 25 and 26 alone, explained by the oral testimony.

However, with much deference to the court, we suggest that the record does show a number of better guides to that inquiry pointed out by previous quotations by us from the report of the Commission. The Commission had no difficulty in weighing the testimony and determining from that testimony what the divisions were between the Orient and its connections and how each one was affected in dollars and cents and how the divisions worked to the disadvantage of the Orient, and the court would have confirmed that opinion if it had not committed a mathematical error in its calculations.

A careful reading of the opinion of the court below leads to this commentary—that whereas the opinion asserts that the order of the Commission

is not supported by any testimony, nonetheless, the opinion discloses the existence of testimony supporting every element contained in Clause 6 of Section 15 of the statute. But, under the interpretation of the court below, this evidence was entirely immaterial. The question comes down to the single issue in the language of the court "of the amount and cost of service to each of them" (p. 47).

In other words, the case stands admittedly here under the opinion of the lower court as having proven these factors:

1. That the Orient was efficiently operated.
2. The amount of revenue required to pay its operating expenses and taxes upon the property held for and used in the service of transportation.
3. The importance to the public of the continuance of this service.
4. That the Orient is an originating, intermediate and delivering line.
5. And generally, that the Orient was laboring under exceptional disadvantages, rendering the existing divisions *per se* "inequitable, unjust and unreasonable."

Because, forsooth, the Commission did not go outside of the section of the statute and develope an element no where prescribed, to-wit, the actual cost to the connecting lines in furnishing the joint transportation, the case must fail for want of proof. In prescribing this rule the court not only sets aside the plain language of the statute but imposes an obligation impossible to be met by proof. It must be obvious from a moment's

consideration, that it would be futile to undertake to so dissect the operating costs of the Santa Fe Railroad Company, for example, as to show even within appreciable limits, the cost of the joint service which it performs with the Orient in any single shipment. Such an allocation of cost to each line on joint traffic is both a physical and accounting impossibility.

To illustrate: A Santa Fe train moving from Chicago to Wichita over the Santa Fe lines containing a car of freight destined to a point on the Orient lines would contain many cars of purely local freight, many cars of freight destined to other points on other railroads. So likewise the car moving over the Orient would be placed in a train containing cars moving between local points and to points destined to points located on other lines. To determine how much of the items which enter into the operating cost of the railroad is to be allocated to this particular car is an impossibility. Any such an allocation would be a mere guess and would be without probative value in any event. Similar illustrations of the impossibility of applying the rule laid down by the court as essential could be continued indefinitely.

VII.

As to the Use of Annual Reports.

The Commission made use of the annual reports of the plaintiffs, as well as of Orient in considering this case. The court below held:

(a) "That the annual reports and the data which they contained were not made a part of the record and were not properly before the Commission for consideration in reaching its conclusion." (Record, p. 45.)

It also held:

(b) "But taking the data extracted by the Commission from the annual reports and embodied in its opinion, their utilization was comparative—not self-probatative of the ultimate fact, but supposedly a means to ascertain that fact." (See p. 45, Record.)

In other words, the lower court, in effect, held that the reports should not have been considered, but having been considered, they amounted to nothing, contained no evidence. The dissenting opinion of Judge Kennedy so completely answers both of the positions taken by the majority opinion below that but very little, if anything, should be added thereto. (See pp. 49-50, Record.)

Considering the objection further, however, in the order of the court's ruling:

a. It is not technically true that these reports were not before the Commission. On the contrary,

they were expressly before the Commission. We quote (Record A, from pages 73 and 74):

"Examiner Burnside: I have no doubt it will be necessary to refer to the annual reports of all these carriers. Will it be understood at the outset that these reports may be referred to?

Mr. Wood: If anything from the annual reports is to be considered in the case, it should be formally a part of the record by abstract or extract therefrom.

Mr. Boyd: I only request that the Commission consider in evidence the reports on file of the respondents and of the carriers, and while they would be available to us, if we were to spend a great sum of money coming up here and getting the transcript of them, they are easily available to the Examiners and to the Commission.

Examiner Burnside: The rules of practice of the Commission now effective, I think, provide that the annual reports may be used in evidence, and the requirement is that all matters which may be pertinent or which may be used in the case, be reproduced and furnished in exhibits, but that would be quite a burden, and I feel constrained to proceed under the rule of the Commission.

Mr. Wood: The reporter will kindly note an exception on the part of the respondents to the consideration by the Commission of any matter in this case that is not formally incorporated in the record and made a part thereof and the contents of which are made the subject of cross-examination.

Examiner Burnside: The exception will be noted."

The exception taken by counsel for the plaintiffs, is the plainest admission that the reports were admitted, otherwise there would have been no point to his exception and the noting of the exception by the Examiner confirmed this view.

Furthermore, the position of the counsel for the Orient plainly indicated that he regarded it of importance to the case that the Commission should consult these reports and if he and the others had not at that time understood that they were before the Commission, obviously there would have been some further reference to them in the way of proof before the conclusion of the hearing, or a further specific attempt to introduce them.

Furthermore, the ruling of the Examiner was in practical effect an interpretation of the rule of the Commission. The Commission, in other words, interprets the rule referred to one way—the court below interprets it another way. But whichever interpretation is correct the ultimate fact cannot be gainsaid, to-wit, that a ruling had been invoked, had been made adversely to the position of the plaintiffs and the reports were being considered and the attention of the plaintiffs was specifically challenged to that situation.

Thus far we have been considering this point as though this were an adversary proceeding in which the plaintiff was the Orient and the other carriers the defendants, and the Orient was making the case. This is the theory which permeates the entire opinion of the lower court, the error of which we have heretofore pointed out.

This proceeding was upon the initiative of the Commission. It was making an investigation. It called upon the Orient and the other carriers for facts and for data, but certainly it could not be confined in the performance of its duty to the limits which might be attempted to be set around it by the action of the parties under investigation. Its functions cannot be circumscribed in such a manner. Its prerogatives are as broad as the statute and as broad as the subject-matter of inquiry indicates they should be and the determination of the Commission of the extent and scope of the inquiry which it, itself, in pursuing must necessarily be conclusive upon everybody, and we see this theory completely borne out by the rule to which the court below adverted.

Quoting from the rule (p. 45 of the Record) as set out in the court's opinion:

"(b) In case any portion of a tariff, report, circular, or other document on file with the Commission is offered in evidence, the party offering the same must give specific reference to the items or pages and lines thereof to be considered. The Commission will take notice of items in tariffs and annual or other periodical reports of carriers properly on file with it or in annual, statistical and other official reports of the commission."

In other words, the sense of this rule is plainly that:

1. Where, in a strictly adversary proceeding before the Commission in which one of the parties

is making a record and assumes the burden of proof, it is incumbent upon such adverse party to bring to the attention of the Commission and on the record extracts from such reports as he thinks should be considered:

2. In an independent investigation initiated by the Commission it will take notice of annual reports without reference to them in the record or otherwise.

Therefore, these reports were incontestably before the Commission. They were considered by it and the court below finds in effect that the Commission committed error in so doing, and in misinterpretation of its own rule.

But here again, we submit, the court misconceives its judicial function in this case. It is not sitting as a court of error and review. Its duty is limited to an ascertainment of not whether the Commission correctly decided the case, nor whether it committed error in the admission of evidence or in the course of its decision, but whether there is any substantial evidence supporting the "opinion" which the Commission reached "on full hearing." So that, confessedly, there was before the Commission these reports. Whether they got there rightly or wrongly is entirely beside the point. They were there and no reviewing court could take them away from its consideration.

b. And this brings us to the second point made by the court—that the reports had no probative force.

It is difficult to understand just what the court below meant by that statement. It illustrates again the difference between the views of the Commission and the views of the lower court, first, as to what the subject of the inquiry was, and second, the conclusions to be drawn from the evidence produced.

The court below says that these reports furnished no basis for any conclusion, whatever. That they contain no evidence. The Commission, on the other hand, says that these reports furnish basic evidence, evidence that is of a very high degree, and from which the Commission as an expert body can deduce the matters and things set forth in its opinion. But surely this court is not going to follow counsel into a discussion of the merits of the controversy in this respect between the Commission and the lower court as to the weight and value to be given to the testimony.

Conclusion.

We respectfully submit that the judgment below was for the wrong party, that it should be reversed and remanded, with directions to dismiss the bill.

January 24, 1924.

CLIFFORD HISTED,

E. A. BOYD,

Solicitors for Intervenors.

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FILED

FEB 21 1924

WM. R. STANSBURY

CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 456

THE UNITED STATES OF AMERICA AND INTER-
STATE COMMERCE COMMISSION,

Appellants,

v.s.

ABILENE & SOUTHERN RAILWAY COMPANY, THE
ATCHISON, TOPEKA AND SANTA FE RAILWAY
CO., THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY, ET AL.,

Appellees.

BRIEF FOR APPELLEES.

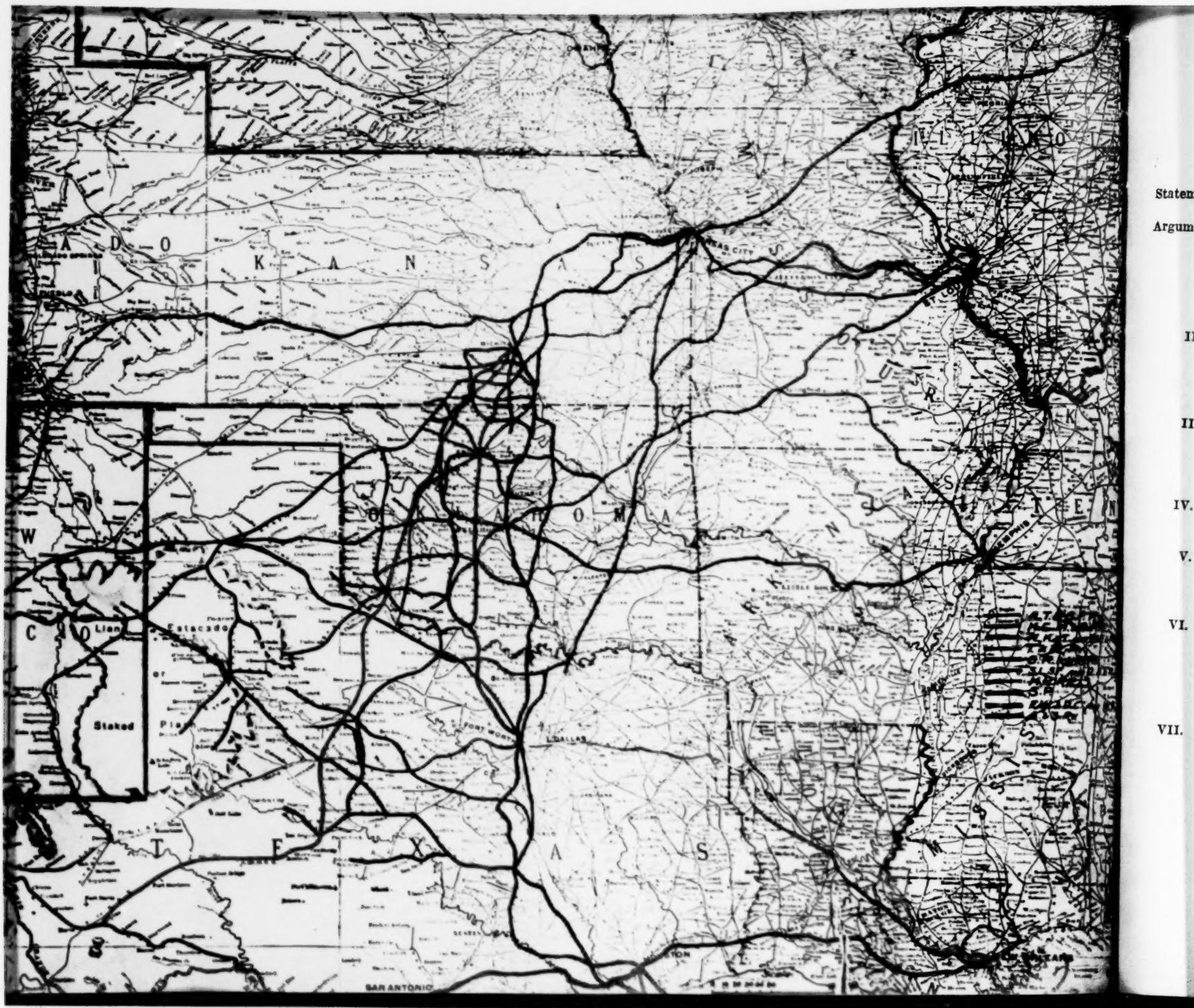
T. J. NORTON,

M. G. ROBERTS,

Solicitors for Appellees.

GARDINER LATHROP,

Counsel.





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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 456

THE UNITED STATES OF AMERICA AND INTER-
STATE COMMERCE COMMISSION,

vs.

Appellants,

ABILENE & SOUTHERN RAILWAY COMPANY, THE
ATCHISON, TOPEKA AND SANTA FE RAILWAY
CO., THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY, ET AL.,

Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

NOTE: As the record made before the Interstate Commerce Commission and the record on appeal in this Court are in separate volumes, reference to the transcript printed in this Court will be indicated by the number of the page with the letters Trans., thus (Trans. 10), while reference to the page of the record of the Interstate Commerce Commission, reprinted and filed in the Court below, and filed here by stipulation, will be preceded by the letters Com., thus (Com. 15).

In order to secure a just apprehension of this case the Court should at the threshold fix in mind the following weighty matters:

FIRST.

On January 1, 1922, three months before this proceeding was instituted by the Interstate Commerce Commis-

sion, the carrier, which has for brevity been designated in this record as the Orient, suffered through an order of the Interstate Commerce Commission (Com. 163) a reduction of freight revenue from grain and farm products amounting (Com. 77, 267) to \$214,800 a year.

While one arm of the government was thus cutting the income of the Orient and its connections, the appellees, another governmental body, the United States Railroad Labor Board, had caused an advance of wages aggregating to the Orient (Com. 272) the burdensome amount of \$325,000 per annum.

Between two such regulating forces carriers stronger than the Orient are staggering.

SECOND.

The Orient never can, according to its traffic manager, earn operating expenses in its present geographical situation between Wichita, Kansas, and Alpine, Texas.

The first evidence presented at the hearing before the Commission (Com. 296) was that for the first three months of 1922, following the reduction of rates ordered, as previously mentioned, the Orient suffered a deficit of \$224,607.47. It was failing to meet expenses (Com. 135) by about \$75,000 per month.

The first testimony offered by the Orient (Com. 78) and its first exhibit (Com. 264) disclose deficits as follows:

1917	\$45,854.07
1920	1,470,106.97
1921	806,740.49

First three mo. '22, \$224,067.47

It was shown (Com. 312) by Exhibit 22 that from 1905 down to 1920 the Orient had failed to earn operating expenses in every year except 1903, 1904, 1907 and 1913.

Exhibit 22 shows such operating deficits as follows:

1905	\$ 5,570.60
1906	3,119.69
1908	104,324.26
1909	192,303.49
1910	61,514.79
1911	145,117.78
1912	334,095.03
1914	28,516.60
1915	273,513.83
1916	468,952.00
1917	580,144.00
1918	695,246.00
1919	1,223,369.00
1920	1,461,279.00

The foregoing financial history explains better than it could otherwise be done what the traffic manager of the Orient meant by this testimony (Com. 187):

"Examiner Burnside: Mr. Shaufler, I think I can make it plain. Do you think it would be sufficient inducement for the construction of a road to limit it to its present operating mileage?

A. No, sir.

Mr. Wood: And you would not recommend the construction of that sort of property?

A. What sort?

Q. Limited as it is now in its geographical extent.

Mr. Boyd: From Wichita to Alpine.

Mr. Wood: From Wichita to Alpine.

A. No. If the property was to continue there as it is now, it would be impossible to make operating expenses."

The foregoing statement of the freight traffic manager of the Orient was repeated (Com. 217):

"I just said, Mr. Examiner, that I thought Mr. Wood's question was whether we would consider building a railroad from Wichita to Alpine. I said no. Such a line would not be able to pay its operating expenses; but if the line was extended to Kansas City it would then, in my opinion, more than pay its operating expense."

That states the situation of the Orient—the question is of geography and capitalization and not of “just, reasonable, and equitable divisions” under Section 15 (6).

Mr. Shaufler stated (Com. 149) that it would require a 65 per cent increase of revenue from divisions to overcome the deficit estimated by the general manager for that year; and he said that if the Labor Board should award, as he hoped, a reduction of wages amounting to \$325,000, he would then need \$1,315,000 out of divisions. That is almost as much as the gross revenue of the Orient for any year of its history as shown (Com. 312) in its Exhibit 22.

As the traffic manager said (Com. 217), if the Orient could be extended to Kansas City and there have an opportunity to compete for the traffic distributed by lines ending at the Missouri River, then it might succeed.

While the case was brought by the Orient for better divisions, the record makes it plain that it is in fact a case in which additional capital is sought.

THIRD.

Under Section 1 (18) of the Interstate Commerce Law, requiring a certificate of convenience from the Interstate Commerce Commission before the construction of a new line, the Orient would to-day be denied permission to build.

The line was built (Com. 100) into a cattle country. It was built into a country (Com. 101) where, “on several occasions in Texas all of the cattle would have perished and died on account of drought.”

It appeared of record (Com. 188), from the report to the Interstate Commerce Commission by Professor Rip-

ley of Harvard University, regarding plans of consolidation under the Transportation Act, 1920:

"Its line from Wichita across Oklahoma absolutely parallels an existing line of the Frisco. And from the Red River, forming the northern boundary of Texas, on to Mexico, the Orient road parallels the Texas & Pacific."

It appeared of record (Com. 155, 162) that the Orient is so paralleled that if the Commission were to attempt to relieve it by giving it specially high rates the shippers would drive their cattle or haul their products to competing lines.

That refutes the statement of the Commission (Trans. 14), drawn from a record other than this, that the Orient "is of essential importance in meeting the transportation needs of the public in the territory which it serves."

Exhibit 23, facing page 312, reproduced in the back of this brief, illustrates through what a network of existing lines the Orient was constructed from Wichita to Alpine; and it shows through what a network of competing lines it must construct if it should ever carry out the original plan of reaching (Com. 197) Kansas City.

It was admitted that those routes competing were largely in existence before the Orient was built. The traffic manager said:

"There has been very little building of railroads since the Orient was constructed."

It appeared also (Com. 172) that this line, constructed among existing and some very strong railways, was intended to reach concessions of valuable timber lands in Mexico. But for want of capital the Mexican section never has been finished. Both ends of the line are missing. Whether the railroad projected would pay if completed, it cannot in its present state be treated as a fin-

ished railroad under "efficient and economical management," in the mind of Congress when it wrote Section 15a (2).

FOURTH.

As it costs the Orient \$1.1163 to earn a dollar, its case is hopeless so far as relief from revenue from its connections is concerned. No matter what its income, it would be a loser under such operation. Its Exhibit 20 (Com. 297) shows its operating ratio to be 111.63. That is the ratio of operating expense to gross earnings. A dollar costing \$1.1163 is a damage. In such circumstances the Orient must either cease operating or it must take some steps to bring its costs within its income.

A high operating ratio shows that a railroad is inefficiently managed, or that it is rendering more service than the density of its traffic justifies (a matter not inquired into at all by the Interstate Commerce Commission), or that the territory which it serves and the traffic which it can secure does not justify its existence, or that its rates are too low. We believe that all these factors contribute to the condition in which the Orient finds itself. But whatever the cause, a dollar costing \$1.1163 is a damage.

FIFTH.

All of the foregoing matters are substantiated by the Orient's life in receivership.

The line from Wichita to Anthony, Kansas, was completed in 1913. Construction was begun at Anthony in 1902. Before the completion of the line a receiver had been appointed. That was on March 7, 1912. The road sold for \$6,000,000, the purchasers assuming the receivership's obligations. Then it ran along until April 17, 1917,

when it went into receivership again. (Com. 186.) That receivership has continued ever since.

On July 1, 1920, the Interstate Commerce Commission refused an application of the Orient for a loan of \$2,500,000 because it believed that the uses to which the money was to be put (for "clearing title" and building an extension, among others) were not those specified in Section 210 of the Transportation Act. But it expressed the view that a sale "might well prove of benefit to the operation of the property by scaling down the present top-heavy capitalization."

Loan to Kansas City, M. & O. R. R. Co. 65 I. C. C. 36.

However, upon a petition for reconsideration the Commission, on October 11, 1920, authorized the loan of \$2,500,000.

Ibid. p. 265.

On February 3, 1921, the Commission supplemented its previous order by permitting the Orient, as long as it should not be in default, to receive and retain the income on any collateral then pledged as security.

Ibid. 67 I. C. C. 23.

On November 26, 1921, the Commission denied an application for an additional loan of \$2,500,00, but it granted an extension of time for another year. Commissioner Daniels dissented, saying:

"For the present and for some indefinite period to come it is certain that this carrier as it stands today cannot earn its operating expenses."

Having shown just what kind of railroad the Orient has been from the beginning, we shall now make an examination of the record upon which the Commission ordered the Orient's connections to take care of it. The order of the Commission was made against appellees subsequently to its loan to the Orient of \$2,500,000.

ARGUMENT.

I.

THE RECORD BEFORE THE COMMISSION WAS WITHOUT EVIDENCE TO SUPPORT THE ORDER MADE, AND THE CARRIERS WERE THEREFORE DENIED THAT "FULL HEARING" WHICH CONGRESS GIVES TO THEM BY SECTION 13 (4).

This proposition is practically conceded in the brief for the United States, a considerable part of which is devoted to an argument that the reports of the carriers to the Commission are usable by it in such cases and are binding upon the companies that make them. In support of this contention the brief contains an appendix of many pages carrying extracts from the Interstate Commerce Law regarding reports of carriers and the records of the Commission. Nothing in the record is cited.

But the brief for the Interstate Commerce Commission undertakes to extract from a record entirely unique some "substantial evidence" to justify the Commission's order.

"Confessedly, from the arguments of counsel and their briefs," said the United States District Court (Trans., 42), "the issue comes down to the inquiry whether or not the necessary facts in support of the Commission's order can be found in the exhibits; otherwise there is no proof on which the order can be rested."

Abilene, etc. v. U. S. 288 Fed. 102.

We shall first examine the record made by the Commission at the hearing and then give attention to the theory that it supports the order.

The Orient's Application.

The Orient applied to the Interstate Commerce Commission on February 23, 1922, for an order respecting the divisions with its connections of freight revenue earned jointly by it and other carriers.

The application, which was made by the Orient shortly after the expiration of the loan of \$2,500,000 previously mentioned, did not complain (Com. 5) that the divisions of joint rates which it was receiving from connections were "unjust, unreasonable, inequitable, or unduly preferential or prejudicial" within Section 15 (6) of the Interstate Commerce Law as amended by Section 418 of the Transportation Act of 1920. On the contrary, the application of the Orient called for (Com. 8) help in the routing over its line of freight in which the government of the United States might be interested and which it might therefore control. Secondly, it asked for an appropriate order from the Commission directing the routing of shipments over the Orient which the shippers themselves might not direct. Thirdly (Com. 11), it asked that the Commission make an appropriate order applicable to divisions which would increase "the earnings of roads having small gross earnings per mile" by deduction "from the earnings of the stronger lines" participating in the shipments. In this third proposal the Orient specifically asked that the additional income be given it "after applying the present carriers' divisions." That is, the Orient not only did not attack the existing divisions, as such, but it asked that they be allowed to stand and that earnings in addition thereto be taken for it "from the earnings of the stronger lines" participating in the shipments.

The Orient set up in its application Exhibits A to J inclusive (Com. 16-35) to illustrate how the existing di-

visions of through rates might be readjusted so as to reduce "the earnings of the stronger lines" and increase the earnings of the Orient. Thus, Exhibit A. (Com. 16-17) would cut the share of the earnings of the New York Central on sewing machines from Cleveland to San Francisco from \$114.73 to \$88.52.

That is illustrative of the plan of the Orient as stated (Com. 11-14) by it in detail in the preceding pages of its application.

The application was accompanied by a brief and argument (Com. 39) in which was shown (Com. 42) a deficit of \$806,740 for the year 1921.

The Orient pointed out (Com. 51) that the percentage of increase in rates prescribed by the Interstate Commerce Commission in *Ex Parte 74* (the case in which an advance of rates by groups was ordered in July, 1920, in pursuance of the direction of Congress in the Transportation Act) was not sufficient to take care of the Orient's operating costs. It said:

"A rate structure sufficiently high to make the weaker lines self-sustaining would give the stronger lines larger returns than that provided by Congress. The Congress in paragraph 6 of Section 15 gave to the Commission full power to adjust divisions of rates so as to provide the weaker lines with sufficient income to permit continued operation, as a matter of public necessity."

As to the first sentence quoted, it was the intention of Congress, stated in Section 15a, that the rates prescribed by the Commission *should* be so high that the stronger lines in a group might earn more than 5.5 or 6 per cent, one-half of the excess earning to go to roads like the Orient; and it was through Section 15a that carriers situated like the Orient were to receive assistance. Such assistance was to be taken, not from carriers earning less than 5.5 to 6 per cent, like most of appellees here, but from those earning more.

The Orient's Evidence.

On April 3, 1922, the Commission ordered an investigation (Com. 63) as to whether the existing divisions "are unjust, unreasonable, inequitable, or unduly preferential or prejudicial within the meaning of paragraph (6) of Section 15 of the said act." On May 15th the case came on for hearing at Washington (Com. 69) and the record there made is contained from page 69 to page 413 of the transcript printed in the Court below.

At the trial the first evidence offered by counsel for the Orient (Com. 75) was of deficits from year to year. The first exhibit introduced (Com. 264) showed deficits as follows:

1917	\$45,854.07
1920	1,470,106.97
1921	806,740.49
1922 (First 3 mo.)	224,067.47

Everything offered for the Orient was of that nature. Nothing was presented to show that existing divisions were "unjust, unreasonable, inequitable, or unduly preferential or prejudicial" to the Orient under Section 15 (6).

Direct and clear evidence of that was a prerequisite to any order by the Commission.

Neither in the written application to the Interstate Commerce Commission, just before reviewed, nor in the evidence presented by the Orient at the hearing, did petitioner make any statement or give any intimation that it believed the existing divisions with its connections were, when judged by the usual standards, in any way "unjust, unreasonable, inequitable, unduly preferential, or prejudicial" under Section 15(6).

It is important to grasp this fact at the outset, for in the District Court and in this Court appellants have

tried to show that there *was* evidence in the record supporting the report and finding of the Commission (Trans., 10), and particularly supporting this (Trans., 18):

"Upon the facts of record we find that the divisions of interstate joint freight rates on traffic interchanged between the Orient and its immediate connections are unjust, unreasonable, and inequitable, and that for the future in respect of traffic originating or terminating on the Orient just, reasonable, and equitable divisions of such joint rates accruing to each of the connecting lines should, on the average, not exceed the following percentages of such divisions:

Abilene & Southern.....	85 per cent.
Atchison, Topeka and Santa Fe.....	75 per cent.
Chicago, Rock Island and Pacific.....	80 per cent.
Clinton & Oklahoma Western.....	90 per cent.
Fort Worth & Denver City.....	70 per cent.
Galveston, Harrisburg & San Antonio.	75 per cent.
Gulf, Colorado & Santa Fe.....	70 per cent.
Midland Valley.	80 per cent.
Missouri, Kansas & Texas of Texas.....	80 per cent.
Missouri Pacific.	80 per cent.
St. Louis-San Francisco.	80 per cent.
Texas & Pacific.	80 per cent.
Wichita Falls & Northwestern.....	75 per cent."

In the case before us the order of the Interstate Commerce Commission very markedly resembles that overturned by this court on January 21st in *United States v. New York Central et al.*, the interchangeable mileage scrip case. That is, "after thus excluding the grounds upon which the order could be justified," as the Court put it, "the Commission" proceeded to enter the order.

The specific tenor of the evidence of the Orient was that it could not pay operating expenses and that it had been almost steadily unable to pay operating costs. And the tenor of the report of the Commission (Trans.,

11) was that one of the Orient companies went into receivership in 1912 and the other company was organized in 1914 to take over its property; and that a receiver for the latter company was appointed in 1917. The Commission further discussed (Trans., 12) the fact and put it in tabular form that from 1912 to 1921, a term of ten years, the Orient had shown a deficit in all years but three. To illustrate this further the Commission's comments on the inability of the Orient to pay interest are quoted (Trans., 14):

"The deficits in railway operating income for the years ended December 1, 1920, and 1921, have already been shown as \$1,407,106.97 and \$860,740.81, respectively. According to the estimate of the Orient, the deficit for 1922 will amount to \$1,590,213. For the year ended December 31, 1920, interest was accrued amounting to \$311,526.65, of which only \$17,622.95 was paid. For the year ended December 31, 1921, interest accruals amounted to \$514,665.32, of which \$150,000 was paid, this payment being applicable to a loan of \$2,500,000 to the receiver, of the Kansas City, Mexico & Orient Railroad Company under Section 210 of the Transportation Act, 1920."

K. C. M. & O. Divisions, 73 I. C. C. 319.

The Commission commented in its report upon the application of the Orient to the Labor Board for a reduction of wages; and also upon the proposal under consideration to make the Orient a differential route, that is, to fix through rates by that route on a slightly higher basis.

But there was not a syllable in the Commission's utterances in review of the testimony presented and of the financial condition of the Orient that indicated that the divisions in effect were, as such, in any way "unjust, unreasonable, inequitable, unduly preferential or prejudicial" under Section 15(6).

After writing an opinion clearly showing that the

question of the reasonableness of the divisions as such was no more in the mind of the Commission than it had been in the mind of the applicant when it drafted its application, the Commission concluded with (Trans., 18) the finding previously quoted "upon the facts of record"—not one of which facts it stated. The brief for the United States does not attempt to find a fact in the record.

The sum and substance of the record before the Commission was that the Orient had been insolvent in all but three years of its operating existence; that the Interstate Commerce Commission had lent to it \$2,500,000; and that thereafter the Orient asked for a hearing and the Commission granted it for the purpose of determining, not what would be "just, reasonable, and equitable divisions thereof to be received by the several carriers," as required by Section 15 (6), but "to deduct," as the Orient's application stated (Com. 11), "*from the earnings of the stronger lines who have participated in a shipment, after having applied the existing carriers' divisions, one per cent on each \$1,000 gross earnings per mile, and apply this percentage difference to the weaker lines participating in the haul.*"

The written application of the Orient (Com. 5), the brief and argument in support of the application (Com. 37), the testimony in behalf of the Orient put in before the Commission by its general traffic manager (Com. 74), and the long report of the Commission discussing the Orient's situation (Trans., 10), all show that the proceedings were not intended to deal with "just, equitable and reasonable divisions" as such, but to employ Section 15 (6) for financing a weak road instead of helping it under Section 15a (5) *et seq.*, as Congress intended and directed the Commission to do.

Moreover, the Orient never expected help from its

connections except out of their *surplus*. It did not ask for divisions which would leave its connections with little or nothing. In the brief of counsel for the Orient in support of the applications to the Commission he said (Com. 62) :

"In financing the operations of the weaker lines, the Commission has two available methods:

First. It may distribute the earnings in excess of the legal return to the weaker lines in the form of a loan;

Second. It may require a division of rates, fares and charges, under the plan which we prepare, which will automatically divert *this surplus* to the weaker lines."

There must be a surplus before there can be a division.

The United States District Court, three judges sitting, went through laboriously all of the testimony, all of the exhibits, and all of the extended argument of counsel which had been made to show a sufficient record; and the searching analysis which the Court makes in its opinion (Trans., 35 *et seq.*, *Abilene, etc. v. U. S.* 288 Fed. 102), amounts to a demonstration not only that the Commission had no evidence to sustain the finding that the divisions were "unjust, unreasonable and inequitable," but also that it did not conduct a hearing for the purpose of ascertaining the facts in that regard.

The Commission's sole purpose was to distribute to the Orient money which it badly needed, but it made the fundamental mistake of not first providing the funds.

Because a carrier loses money, that does not prove that its share of the earnings is inequitable.

The District Court said:

"We appreciate the fact that the ability of the Commission to make proper deductions and conclu-

sions from statistics embodied in these exhibits, with which it is their duty to constantly deal, is far greater than ours; but after prolonged study of these exhibits we have been unable to find in them any proof which in our judgment tends to show what the existing divisions were, or to support a conclusion that those divisions are unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the participating carriers."

After the reception by the Commission of what has been in this record referred to as evidence it went into its archives and worked out what is known in the case as sheet 6 (Trans., 16), in which it employs an "equated ton mile," arrived at by adding to the freight ton miles three times the passenger miles (Trans., 15), "the ratio between freight revenue per ton mile and passenger revenue per passenger mile in that territory being approximately as one to three."

"It would be a very strong proposition to say that the parties were bound in the higher courts by a finding based on specific investigations made in the case without notice to them."

The foregoing proposition is quoted from the opinion of this Court in 1912 in *United States v. Baltimore & Ohio Southwestern Company*, 226 U. S. 14 (20), where the Interstate Commerce Commission admitted that it based its conclusion that a lateral branch line connection was necessary more largely upon its own investigation than upon the testimony of witnesses.

Two months after the Baltimore and Ohio case just cited was decided this Court had to do with the record made by the Commission in a rate case, and it there set aside once for all the theory long held by the Commission, that it could decide a particular case, not upon the evidence and the exhibits received by it in open hearing in the presence of the carriers, but that it might bring to its aid in reaching its conclusion information

which it had gathered in other cases or in other investigations. This Court said:

"A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficially exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

Interstate Commerce Commission v. Louisville and Nashville (Jan. '13), 227 U. S. 88 (91).

In the foregoing case the carrier introduced in Court all the evidence before the Commission and contended that "this evidence utterly failed to show that the rates attacked were unreasonable." ,

While the Court held that the record contained some substantial evidence, and also that there was a conflict which "the courts cannot settle," it laid down the rule quoted, and added, in answer to the argument that the Commission is an administrative body and not strictly bound by the rules of evidence (p. 93):

"But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days."

This last paragraph, important in the highest degree, is omitted in the brief (p. 35) for the Commission when it quotes from the Louisville and Nashville Case.

In the preceding year this Court had laid down with

great particularity the conditions in which an order of the Interstate Commerce Commission is final and those conditions in which it is not:

"In cases thus far decided it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

Interstate Commerce Commission v. Union Pacific (Jan. '12), 222 U. S. 541 (547).

Under (4) in the foregoing an order of the Commission is invalid if the rate prescribed be confiscatory. The case at bar is in reality a rate case; and as appears in the record (Trans., 20-33), the earnings prescribed for many of the carriers would be entirely noncompensatory.

The order of the Commission was also invalid under (5) because it was contrary to—that is, unsupported by—the evidence.

This Court has held that a scintilla of evidence will not do—there must be "substantial evidence" to support the order.

Interstate, etc. v. Union Pacific (Jan. '12), 222 U. S. 541 (547).

Where the question was whether the earnings of dividends by a carrier shed any light on the reasonableness or unreasonableness of a particular rate, this Court laid down a principle which shows that the financial ability of the appellees here to pay, and the financial inability of the Orient to get along, are matters absolutely without any bearing on the case:

"For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article."

Interstate, etc. v. Union Pacific (Jan. '12), 222 U. S. 541 (549).

Now, we contend that the tenor of the report of the Commission (Trans., 10 *et seq.*) is that the Orient must be helped, and the tabulation worked out by the Commission after the hearing to give it help (Trans., 16), taken with the deductions made by the Commission from the earnings of the several appellees (Trans., 18), shows unmistakably that the order was based on the need of the Orient for money and the assumed ability of appellees to pay, a heavier deduction being made from the earnings of the so-called "stronger lines."

But according to the foregoing case, the financial condition of the Orient and the financial condition of any one of appellees could not be taken into account. Up to the time of the Transportation Act that was settled—that the Interstate Commerce Commission could not help the Orient out of the revenues of its more fortunate connections. But a new section was put in by the Transportation Act for the purpose of assisting weak carriers *after some* of the stronger lines in a group territory had earned from the rates more than 5.5 to

6 per cent. By that enactment Congress recognized that money cannot be taken from one carrier and transferred to another when the first carrier has not earnings sufficient for itself. Therefore, Congress provided a plan whereby strong carriers might earn a surplus, not for themselves, but for the benefit of the weaker lines within a group. It appeared from the Commission's own calculations (Trans., 16) that the earnings of all carriers in the territory served by the Orient are inadequate, with few exceptions. Consequently, the Commission could not, under the case just before cited, take earnings from such carriers and transfer them to the Orient, no matter how badly off the latter was.

"The transportation act discloses no intention," said the District Court (Trans. 46), "to vest the commission with power to relieve the necessities of weaker lines by imposing the burden upon its connections, simply because they are able to bear it. It exhibits a contrary purpose in section 15-a, because that policy would tend to bring all carriers to the same level in earnings and there would be no necessity for loans and no fund probably could be recovered for making them."

Our review of the record discloses that the Commission made no inquiry whatsoever into the efficiency or inefficiency of the operation of the Orient, although it quoted in its opinion (Trans., 12) the provision of Section 15 (6) requiring it to "give due consideration, among other things, to the efficiency with which the carriers concerned are operated." How many trains per day the Orient operates in each direction, whether one-fourth or one-half of the number of trains would sufficiently meet the needs of the public, whether it was wisely or unwisely spending money in the transportation service—these seem to have been matters of no mo-

ment, notwithstanding that Congress said that they must be ascertained in a division case.

Instead of following the statute in this respect, the Commission seems to have put the onus upon appellees (Trans., 14):

“No allegation of inefficient operation appears against the Orient or any of the respondent connecting lines.”

Congress made it the affirmative duty of the Commission to ascertain the facts in this relation. It was not the duty of connections of the Orient to make any “allegation” whatsoever.

However, as we pointed out at the beginning, the Orient itself (Com. 297), by its Exhibit 20, showed an operating ratio of 111.63, meaning that it was costing the Orient \$1.1163 to earn a dollar. What further “allegation of inefficient operation” did the Commission need, and why did it not follow up the clue?

After setting out sheet 6 (Trans., 16), disclosing the “equated ton mile,” the Commission says in its opinion (Trans., 17):

“The gross revenue of the Orient per equated ton mile is greater than that of nine of its connections.”

That is, on the Commission’s own figures as to work done the Orient had generally the better of divisions.

The Commission says (Trans., 17):

“Its [the Orient’s] earnings per car mile are substantially smaller than eleven of the thirteen connections.”

That means nothing except that the road in a region of thin traffic cannot have the big carloads that are obtained by carriers serving coal mines, great grain fields, steel mills, and other sources of heavy tonnage. The fact stated is of no importance in this case.

The Commission continues (Trans., 17):

"The operating expenses per equated ton mile are greater than those of any connection except two small roads."

We previously disposed of that when we pointed out that the Orient itself had made proof (Com. 297) by its Exhibit 20 that its cost of earning a dollar was \$1.1163.

Pointing out (Trans., 17) that it cost the Orient 41 per cent more than it costs its connections to earn \$1 in freight service, and 75 per cent more to earn \$1 in the passenger service, the Commission concludes (italics ours):

"This disparity * * * would seem to indicate that the passenger fares and freight rates and divisions accorded this carrier are not sufficient."

On the contrary, it plainly indicates—without any seeming—either that (1) the Orient is inefficiently managed, or (2) that it is rendering more service than the density of its traffic justifies, or (3) that the territory which it serves and the traffic which it can secure do not justify its existence.

Moreover, an important order like this should not be based upon anything that *seems* to be.

II.

THE HISTORY OF THE NEW ENGLAND DIVISIONS CASE SHOWS MORE CLEARLY THAN IT COULD OTHERWISE BE EXPLAINED THE COMPLETE DEFICIENCY OF THE RECORD BEFORE THE COMMISSION IN THE PRESENT CASE.

That history will be referred to briefly to show the difference between the "full hearing" required by the act and the so-called hearing in the case at bar.

First, the complainants in the New England case of-

ferred abundant evidence directly touching divisions (italics ours):

"Complainants submitted exhibits showing the divisions as between the New England roads and their western connections of several thousand joint rates applying between every division block of complainants other than the Bangor & Aroostook and representative points of traffic importance in all parts of the eastern group. *One of the principal witnesses for defendants testified that the selection was illustrative and fair.*"

Bangor & Aroostook R. R. Co. et al. v. Aberdeen & Rockfish R. R. Co. et al. (Jan. '22), 66 I. C. C. 196 (201).

In this case there was no proof of what the existing divisions were or what ones, if any, were too high or otherwise inequitable. As the traffic of the Orient consisted largely of live stock (Com. 84), grain, cement and a few other commodities, the local traffic being too small (Com. 85) to find, it would have been no trouble for the Commission to require the Orient to make open and specific proof of what its divisions were to the leading live-stock markets, to the leading grain markets, and on a few of its other chief commodities. In the New England case that was definitely done and the defendants had an opportunity to meet it.

We do not contend, as the brief for the United States says, that "all of the division sheets applying to all of the 13 connecting lines and the 40 defendants before the Commission as well" were necessary in evidence, although it would have been no burden upon the Orient to put them in. The bulk of the revenue of the Orient came from three or four commodities, and the divisions on those at least should have been dealt with at the hearing.

Second, in the New England case the Commission

made no order concerning commodities as to which no evidence of divisions had been given (p. 200):

"There is no evidence with respect to the divisions on coal and coke, fluid milk and its edible products, high explosives, or certain low-grade commodities moving short distances. Nor were divisions of the Bangor & Aroostook shown. *Findings cannot be made with respect to any of these divisions, and complainants do not now ask for such findings.*"

If the lack of evidence on what divisions were in the New England Case prevented an order, why was an order made without such evidence in this case?

Third, in the New England case there was definite evidence of a change of conditions which made divisions once reasonable entirely unreasonable (p. 201):

"The further evidence with regard to the effect of the recent extraordinary changes leads inevitably to the conclusion that the scales which formerly hung approximately level as between the participating carriers are now tipped against the New England roads."

Fourth, the Commission pointed out (p. 202) that when it granted in *Ex Parte* 74 an advance of rates under the Transportation Act of 1920 (58 I. C. C. 220) it called attention to the financial condition of the New England lines and cautioned the carriers "to give careful consideration to the joint rates accruing to these lines," which the carriers failed to do. That is, the Commission had provided by an advance of rates additional funds for the New England lines which the connections of those lines had failed to give. In the case before us, on the contrary, the Commission reduced on January 1, 1922, as previously shown, some of the advances accorded to the Orient in *Ex Parte* 74 as one of the lines in the western group. That reduc-

tion on grain and other farm products cost the Orient (Com. 77) \$214,800 per year. Its connections lost seriously.

Fifth, the special three-judge Court, which was convened when the eastern carriers filed a bill to enjoin the operation of the Commission's order in the New England case, said:

"Upon the hearings before the Interstate Commerce Commission evidence was offered to support the claims advanced by the petitioning New England lines. Such testimony is in considerable volume and was given in considerable detail. It established that the joint rates in New England were established in the early 70's and most of the New England road's divisions dated back more than 32 years ago, and in spite of the changes in the railroad situation, the basis of these divisions has remained practically unchanged.

Akron, etc. v. United States (May '22), 282 Federal 306 (308).

That alone was evidence justifying some change of divisions. The District Court quoted from the report of the Commission showing the extraordinary and unusually expensive transportation service which the New England carriers were obliged to render in comparison with that of western lines (p. 209):

"Their hauls are short; their traffic splits at different junction points, and is diffused over many secondary and branch lines; their train loads are necessarily relatively light; the density of their freight traffic is relatively low; and, while their investment per mile of road is low, their investment per revenue ton mile is relatively high."

Sixth, when the New England case came to this Court it was found that the facts of record before the Commission disclosed an indefensible condition in New England, the earnings of one carrier, for illustration,

from freight local to its line being four times as high as that received from existing divisions.

New England Divisions Case, 261 U. S. 184 (192).

Seventh, this Court said in the New England case (p. 195) :

"There is no claim that the apportionment results in confiscatory rates, nor is there in this record any basis for such a contention."

But in the present case the charge of confiscation was distinctly alleged in the bill and proof of the confiscatory effect of the Commission's order was made (Trans., 33) in the District Court.

III.

AS SECTION 15 (6) HAS BEEN CONSTRUED BY THIS COURT THE COMMISSION CANNOT TRANSFER DIVISIONS FROM ONE CARRIER TO ANOTHER FOR THE FINANCIAL HELP OF THE LATTER UNLESS THE FORMER'S EARNINGS ARE SUFFICIENT UNDER EXISTING RATES.

Discussing in the New England case the purpose of Congress in Section 15a of the act, that the Interstate Commerce Commission establish such rates as would provide funds for the help of the weaker carriers, the Court said that Section 15a, relating to excess earnings, must be read in connection with Section 15 (6), relating to divisions:

"To accomplish this two new devices were adopted: the group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshalling

the revenues, partly through capital account, it was planned to distribute augmented earnings, largely in proportion to the carrier's needs. This, it was hoped, would enable the whole transportation system to be maintained, without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was indeed indispensable."

New England Divisions, 261 U. S. 184 (191).

Now, as by Section 15a (6) Congress specifically provided for excess revenue to a well-situated carrier before there should be any distribution to a weaker line, it follows, since this Court has put the two sections to one purpose, that until the Commission has allowed such rates as will give to a well-situated carrier earnings beyond the level specified in the law, its revenues cannot be depleted for divisions on the ground that another carrier needs assistance. The Commission may change divisions when it finds, as a matter of fact, regardless of the earnings of either carrier, that they are "unjust, unreasonable, inequitable, or unduly preferential or prejudicial," within Section 15 (6) by any of the usual standards of judgment. But when it comes to transferring money from one carrier to another under the policy of Congress stated in the Transportation Act, it must first provide the money to be distributed under Section 15 (6) as it is required to do under Section 15a (2) *et seq.*

This condition existed in the New England Divisions case. The Commission had provided the revenue by various advances and had told the carriers to take care of the New England lines, which they failed to do. As this Court said, there was no question of confiscation, and there could have been none on that record. But, as be-

fore pointed out, the advances in the western group made to the Orient and its connections in *Ex Parte* 74 were taken away in considerable part on the first of January, 1922.

On the correct reading of Section 15 (all of it, not segregated phraseology, for it is the rate-making section of the law, which was introduced in Roosevelt's administration) and on the difference between dividing *existing* rates which may be unfairly apportioned, and the double duty of *fixing AND dividing joint rates*, we quote the lucid statement of the District Court (Trans. 46-7):

"No one but participating carriers are interested in a redivision of existing rates. So that it seems obvious to us that the phrase in paragraph 6 so much relied upon intends that all of the subjects named for consideration have application only where the inquiry goes to the extent of both fixing and dividing the joint rates; and that where it extends only to a division of existing rates some of the things named for consideration by the commission have no relevancy to or weight in determining what the new divisions shall be. In such an investigation we think the controlling inquiry must necessarily be directed to ascertaining the amount and cost of service to each of them."

It is argued in the brief for the Interstate Commerce Commission (p. 56) that although the earnings of the Orient's connections in the western group may have been inadequate, nevertheless the Commission could order the connections to enlarge their divisions to the Orient and leave it to them to apply for an advance of rates or otherwise make provision for the money necessary to support the Orient. In view of the fact that the petition of the Orient to the Commission was based in great part upon the Commission's reduction of the rates to it to the extent of \$214,800 per annum (Com. 77, 267), an application for an advance could not have been made with

any hope. It is a maxim that the law does not require one to do a manifestly idle thing.

Why did not the Commission go into this subject and find out what were the needs of the carriers in the western group and provide a level of rates which would have taken care of them all and given them a margin over for the help of the Orient? That is the course which it took in the New England Divisions case.

In *Dayton-Goose Creek Railway Company v. United States*, decided January 7, 1924, this Court construed Section 15a, which directs the Commission to provide out of rates a surplus for distribution toward the up-building and efficiency of weaker lines. It held that the excess earnings thus secured by stronger lines under rates prescribed by the Commission make a trust fund which is received and held by the earning carriers for the benefit of others. But under the plain provision of the law there must be an excess before there can be a distribution.

Now, taking the decision of this Court in the New England Divisions case, in which rates sufficient for all lines had been provided before the divisional order was made, and then taking the decision of this Court in the Dayton-Goose Creek case, in which there was no dispute that the carrier had earned more than 6 per cent on the value of its property, and we have the two sections of the law operating where the Commission had provided, by establishing rates, adequate revenues for all of the carriers concerned, including an excess for distribution among the weaker ones.

But in the present case the Commission disregarded not only the intention of Congress, but it also took away from those who had not. For all of the other carriers in the western group had suffered similarly from the

freight reductions made by the Commission on January 1, 1922, and were earning less than the Transportation Act allowed to them.

Moreover, it appeared of record in the District Court (Trans., 34) that the Railroad Commission of Texas had held, upon application of the Orient for an increase of state rates, "that the existing freight rates applicable to the movements of traffic between the Kansas City, Mexico & Orient Railway Company of Texas and its connections seem just and reasonable, and that the prayer of the petition herein should not be granted." The Texas Commission pointed out that in the hearing "the stressed financial condition of a railroad company as a factor in arriving at a just division to accrue to it of a joint freight rate" was urged. Since the Interstate Commerce Commission had reduced the interstate rates and the Texas Commission had refused to advance the state rates, the suggestion in the brief of the Commission (p. 56), that "if some of the rates are too low the carriers have a right to raise them to a reasonable basis," is entirely without merit.

We repeat that whether the Commission acts under Section 15 (6) or under Section 15a its providing adequate funds must precede a distribution.

IV.

THAT PART OF THE RECORD UPON WHICH APPELLANTS HAVE BEEN DRIVEN TO RELY SUPPORTS FULLY THE CLAIM OF THE CARRIERS.

In the brief for the United States no attempt is made to point out in support of the Commission's order anything openly offered in evidence before it during the hearing. The silence of counsel for the United States is

a concession of our contention. He argues that the carriers are bound by their reports to the Commission and that the contents of those reports may be legally used as they were, without any warning under the rules established by the Commission as to what parts of the reports would be employed or in support of what proposition they would be used.

In a footnote to the New England Divisions Case (p. 198) this Court said :

“Papers on the Commission’s files are not a part of the record in a case,—unless they are introduced as evidence.”

That was said of tariffs of rates, which the law requires the carriers to print and publish.

But in the brief for the Commission (pp. 40 to 42) the position assumed in the District Court is reoccupied and there is repeated the minutest examination of Exhibits 25 and 26 (Com. 326-327), as well as the exhibits following, 27 to 41, to show support for the order made. The District Court said (Trans., 42) :

“Confessedly, from the arguments of counsel and their briefs, the issue comes down to the inquiry whether or not the necessary facts in support of the Commission’s order can be found in the exhibits; otherwise there is no proof on which the order can be rested.”

The correctness of that statement is shown by the fact that in the brief for the Commission, in this Court, under Title III, pages 30 to 51, asserting that “there was sufficient evidence before the Commission to support its order,” not a syllable of the oral testimony on any aspect of the case is mentioned. The whole argument narrows down to the exhibits and to the deduction made from them and from its archives by the Commission. Not a word on any of the matters specified by the Act of Congress as requiring careful investigation. Not a word

about "the efficiency with which the carriers concerned are operated." Not a word about "the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property"; and especially not a word as to whether appellees were situated financially to bear the order made. Not a word with respect to whether "any particular participating carrier is an originating, intermediate, or delivering line," as required by the Act, concerning any kind or kinds of traffic.

On that state of the record the District Court said (Trans., 44):

"Counsel for the Commission does not argue that the exhibits alone show the divisions or that they are unjust and inequitable, but for that purpose contends that the exhibits, coupled with data taken from the annual reports of the Orient and of the thirteen plaintiff carriers, which are set out in tabulated form in the Commission's report, sustain the conclusion of fact and order. He concedes that the data so made up from the annual reports as in part the basis for the Commission's conclusion could not be obtained from the testimony and exhibits in the case, but contends that the Commission had a right to consider the annual reports filed with it by the carriers for the purposes for which they were used in reaching its conclusion."

The annual reports of the carriers were not in the record in this case, according to the rule laid down in the footnote in the New England Divisions case hereinbefore quoted.

The brief for the Commission discloses a total disregard by that body of the requirements of Section 15 (6) for "prescribing and determining the divisions of joint rates." This is because, as we remarked at the outset, the Commission believed that it could distribute money where money was needed, and it therefore looked into

nothing but the needs of the Orient. The District Court said (Rec., 42):

"The building of a line into nonsupporting territory, or into a field already adequately served, cannot be justly debited to other carriers."

It now becomes necessary to take up Exhibits 25 and 26 (Com. 326-327), upon which counsel relied chiefly in the District Court, and upon which they chiefly rely (p. 41, *et seq.*) in the brief for the Commission in this Court, as well as the exhibits following, 27 to 41; and to take up also sheet 6 (Trans., 16), which the Commission prepared from its archives after the hearing had ended and which it sets out as a justification of the order made.

Let it be kept in mind, as the District Court said in the language before quoted, that the exhibits alone are not enough—they must be considered with the tabulation based on a fiction known as "equated ton-miles."

We shall consider first the exhibits and then the tabulation.

Exhibits 25 and 26.

The exhibits, as a glance at them reveals, were simply recapitulations of tons of freight traffic either delivered to or received from connecting lines by the Orient during 1921. They showed for the Orient and its connections, respectively, the ton-miles, the revenues, and the revenue per ton-mile resulting from that interchange.

But there is absolutely nothing in those exhibits disclosing the kind of traffic handled, whether it consisted of cotton, cotton linters, grain, live stock, plaster, citrus fruits, fresh fruits, vegetables, or lumber, all of which the Orient interchanges with its connections.

There is nothing to tell whether in the handling of any particular kind of traffic the Orient or any of its connections acted as "an originating, intermediate, or delivering line"—among the most important factors to be

known in fixing fair divisions, and specifically named in the law for ascertainment and consideration.

There is nothing to show the length of miles or the character or kind of service performed by either the Orient or any of its connections with respect to any particular kind of traffic interchanged—factors also indispensable to the ascertainment of equitable divisions.

There is nothing to show the cost of service to either the Orient or any of its connections as to any particular kind of traffic.

There is nothing to show what the divisions per se were between the Orient and its connections with respect to each or any of the various kinds of traffic interchanged. The divisions themselves being unknown in the record, how could the Commission legally "find" them unjust?

Finally, there is not a thing in those exhibits or elsewhere in the record to indicate compliance by the Commission with the very first command from Congress, namely, to "give due consideration, among other things, to the efficiency with which the carriers concerned are operated"—except, of course, that the Commission was notified by Complainants' Exhibit 20 (Com. 297) that it was costing the Orient \$1.1163 to earn a dollar.

It was, therefore, impossible for the Commission to determine from the testimony before reviewed and those exhibits what service the Orient or its connections performed for any class or commodity of traffic, or what the cost of such service might be, or what were the existing divisions. Consequently, it was impossible for the Commission to make a valid finding that existing divisions were "unjust, unreasonable, inequitable or unduly preferential or prejudicial," within the law.

At the bottom of page 41 of the brief for the Commis-

sion this sentence follows a discussion of Exhibits 25 and 26 and an illustration of what they prove by a reference to the Santa Fe:

"Like information is shown as to the business interchanged on joint rates between the Orient and each of its connections."

If it is meant by that to say that the results as to ton-mile revenues will be the same or even approximately the same as they show for the Santa Fe and the Orient in the example cited, the statement is misleading. For a simple calculation of the ton-mile earnings and revenue of the Orient and its connections contained in Exhibits 25 and 26 shows that as to all traffic exchanged the average revenue per ton-mile for the Orient is .0147, while the earnings of all connections is .012. In other words, the exhibits upon which the Commission relies clearly show that upon all of the traffic interchanged with its connections the Orient is given approximately 3 mills per ton per mile more than its connections receive.

Since Exhibits 25 and 26, introduced by the Orient, show that it was receiving on interchange traffic about three mills per ton per mile more than appellees were receiving for their service, the Commission was thereby notified that some direct and positive evidence of extraordinary conditions would be necessary to overcome the existing fact that the Orient was already receiving more than its share of the earnings.

The brief for the Commission (p. 47) says that "the existing divisions did not properly reflect the relative burdens borne by the connecting carriers." To support that a comparison is made between the average per ton-mile revenues accruing to the Orient and its connections on the *interchange* traffic with the operating expenses per equated ton-mile on *all* of the tonnage moved either by the Orient or by its connections.

That is clearly an erroneous comparison, because the per ton-mile revenues were based only on traffic *actually interchanged* between the Orient and its connections, while the operating expenses per equated ton-mile, as determined by the Commission, include the expense to the Orient of handling the traffic *local* to its line, and, in so far as the connections of the Orient are concerned, include not only the expense of handling their local traffic, but also that of traffic interchanged with connections other than the Orient in the movement of which the latter did not participate.

There is absolutely nothing in the record to show that the average cost of handling all traffic is comparable with the cost of handling interchange traffic.

It may be more or it may be less, but there is nothing to disclose what the real facts are.

Having shown that Exhibits 25 and 26 prove that the Orient was receiving a larger share of the earnings than its connections were getting, we pass from those exhibits, so much relied upon in the District Court and in the brief in this Court, and give attention to sheet 6 in the report of the Commission.

The Equated Ton-Mile.

The "equated ton-mile" on which the Commission turned its decision against the carriers is a figment of its mind and utterly worthless for the purpose to which it was put. The Commission admits (Trans., 15) that "the reduction of gross earnings or expenses to units of this character does not produce absolutely correct results."

And counsel for the Commission say in the brief (p. 48):

"We make no claim, of course, that the Commis-

sion had before it figures from which it could reach its conclusion by the simple application of a mathematical formula based upon unit revenues, unit costs, operating ratios, etc."

It is impossible for the Commission to add "to the freight ton miles three times the passenger miles." A freight ton-mile expresses horse-power spent or labor done. A passenger-mile means distance traveled without any relation to the cost or labor of compassing the distance. You cannot add weight carried to distance traveled and thereby produce any sound measure of what the Commission calls "all revenues and all expenses." There is no way to reduce tons hauled and passenger-distance traveled to a common denominator.

If the Commission desired to get at "all expenses," it might have dealt with the gross ton-miles (combined weight of the car and the load) in the freight service and the gross ton-miles in the passenger service. Then it would have been dealing with horse-power expended—that is, the relation of costs to earnings in each of the two branches of the transportation service. The ratio of those two expenditures of horse-power might, perhaps, be a basis for dividing "all expenses," or the costs of earning the money in each of the two branches.

And even after that had been ascertained, a comparison of "all expenses" on the Orient with all expenses on its connections would have but little if any illuminating (and no probative) value until it had been shown that the relationship between freight and passenger traffic on the Orient was the relationship on each of its connections. That is, the figures obtained would prove nothing in a comparison with those of a road carrying treble the passenger business of the Orient and perhaps half as much freight traffic, or with a road having ten times the freight traffic of the Orient and little or no passenger traffic.

Therefore, "in comparing the revenue needs of the" Orient "and its connections," as the Commission did (Trans., 15), the equated ton-mile, "derived by adding to the freight ton-miles three times the passenger-miles, the ratio between freight revenue per ton-mile and passenger revenues per passenger-mile in that territory being approximately as one to three," it used, in our opinion, a false and consequently worthless factor.

It is to be emphasized that none of the data submitted by the carriers on the request of the Commission had anything to do with passenger-miles or passenger traffic (Com. 149); and an examination of Exhibits 24 to 42 (Com. 313 to 376) shows that they deal *only* with tons and ton-miles of *freight*.

The record is totally destitute of information about the passenger business of appellees, and therefore the equated ton-mile (into the construction of which the passenger traffic enters) was made *dehors* the record.

The tabulation known as sheet 6 would not have been sufficient to support the order made by the Commission, even had it been introduced in evidence at the hearing. But the use of the matter was entirely contrary to the holding of this court in *Interstate, etc. v. Louisville & Nashville*, 227 U. S. 88 (91), in which it was said that everything upon which an order of the Interstate Commerce Commission is based must have been laid upon the table at the hearing for the carriers to examine and controvert; and the Commission's action was in disregard of a specific objection made by counsel for the carriers (Com. 73) at the outset of the case:

"Mr. Wood: If anything from the annual reports is to be considered in the case it should be made formally a part of the record by abstract or extract therefrom."

The Examiner, following Mr. Wood's objection, said

(Com. 74): "I feel constrained to proceed under the rule of the Commission," referring to Rule XIII of Rules of Practice before the Commission, paragraphs (a) and (b) of which are quoted in full (Trans., 44-45) in the opinion of the District Court. The rule requires that matters contained in books, papers or documents and offered for introduction must either be read into the record in the presence of the opposing party, or else "a true copy of such matter, in proper form, shall be received as an exhibit, and like copies delivered by the party offering the same to opposing parties." And where anything in the files of the Commission is offered the party "offering the same must give specific reference to the items or pages and lines thereof to be considered." Even when it is desired to refer to tariffs or reports "it must be done with the precision specified in the second preceding sentence." Finally, "When exhibits of a documentary character are to be offered in evidence, copies must be furnished to opposing counsel." That long-standing rule of the Commission, upon which counsel for the carriers relied in the statement by Mr. Wood just before quoted, was entirely disregarded by the Commission when it prepared sheet 6 and turned its decision against the carriers upon that compilation.

Later in the case (Com. 129) this objection was made:

"Mr. Wood: The respondents will object to the consideration of anything not offered in a public hearing."

In preparing sheet 6 from matter not introduced at the hearing the Commission disregarded its own rules of practice.

"Papers on the Commission's files," said this Court in a footnote to the New England Divisions case, "are not a part of the record in a case—unless they are introduced as evidence."

From the foregoing consideration of Exhibits 25 and 26 and Exhibits 24 to 42 we see that they prove, not that the divisions of the Orient are "unjust, unreasonable, inequitable, or unduly preferential," but that on all of the traffic interchanged the Orient received \$.0147 per ton mile for the services performed and its connections received \$.012.

As to sheet 6 constructed out of an equated ton-mile, the Commission itself says (Trans., 17):

"The gross revenue of the Orient per equated ton-mile is greater than that of nine of its connections."

The railway operating income, shown in the last line of sheet 6, discloses that only four of the thirteen appellees earned, even according to the record thus made up by the Commission, as much as 5½ to 6 per cent authorized by Congress in Section 15a (3). On such a record the Commission could not make a division of rates without first having provided, as it did in the New England Divisions case, the necessary money for division.

V

ACCORDING TO THE TABULATION PREPARED BY THE COMMISSION KNOWN AS SHEET 6 THE DIVISIONS PRESCRIBED BY IT FOR THE CONNECTIONS OF THE ORIENT ARE GENERALLY CONFISCATORY.

Elsewhere in this brief we have shown that according to exhibits 25 and 26, relied upon by opposing counsel in the District Court and by counsel for the Commission in the brief in this Court, the Orient received .147c per ton-mile on all traffic interchanged with it, while the interchanging connections received only .012c. The District Court commented upon that as follows (Trans. 43):

"Comparing the rate per ton mile received by the Orient with that received by all of the 13 connecting

carriers on all of their interchange business with the Orient for the year 1921, it appears that the rate to the Orient on that basis is slightly in excess of the average to all of the connecting carriers on the same basis; that is to say, the Orient received .0147c per ton mile, while the average received by all of the 13 connecting carriers was .012c. It received a higher ton-mile rate, both on traffic which it originated and also on traffic delivered to it by plaintiffs, than they received."

That shows that thus far the record was with the connecting carriers.

In the trial Court Mr. Dana, assistant freight traffic manager of The Atchison, Topeka and Santa Fe Railway Company, took up (Trans., 30) sheet 6, and showed the effect of it by introducing (Trans., 33) Exhibit B and testifying:

"There is no matter here that has not been considered by the Commission * * * I am simply showing in this exhibit for all the carriers what Mr. Fort, in reply to the interrogation of the Court, showed with respect to the A. T. & S. F. * * * The first page is a statement of ton miles and revenues under present divisions as ordered in I. C. C. Docket No. 13688 accruing to the plaintiff carriers in this proceeding on freight traffic."

Then he pointed out that the revenue of the Abilene and Southern under the order of the Commission would be 3.733c, while its operating cost would be 3.249c. The revenue for the Santa Fe would be 1.449c and its operating cost 1.097c. For the Rock Island the revenue would be .868c and its operating cost 1.157c. The Clinton, Oklahoma and Western would earn 3.982c under a cost of 4.06c. And so on. As to the first sheet Mr. Dana concluded (Trans., 31):

"Under sheet 1 of the Exhibit 11 of the 13 carriers are shown to suffer a loss under the order of the Commission. On sheet 2 but 10 are shown to suffer a loss."

In the first sheet Mr. Dana took the data submitted by the Orient (Com. 326-7) in Exhibits 25 and 26 and compared them with the divisions allowed and the costs stated by the Commission.

In sheet 2 he took the data submitted by appellee carriers on the request of the Commission near the close of the hearing and contained in Exhibits 27 to 42, inclusive, shown at pages 328 to 376 of the Commission's record. That comparison showed that 10 of the 13 carriers would fail to receive operating costs from the divisions ordered.

On what a public service corporation should earn we shall be content with quoting from one decision of this Court:

"We cannot approve the finding that no rate yielding as much as 6 per cent upon the invested capital could be regarded as confiscatory, in view of the undisputed evidence, accepted by the master, that 8 per cent was the lowest rate sought and generally obtained as a return upon capital invested in banking, merchandising, and other business in the vicinity; 7 per cent being the 'legal rate' of interest in Nebraska. Complainant had not such a monopoly nor were its profits 'virtually guaranteed' in such a sense as to permit the public authorities to restrict it to a return of 6 per cent upon its invested capital."

Lincoln Gas v. City of Lincoln (June, '19), 250 U. S. 256 (267).

While the Transportation Act limits the earnings of a carrier to 6 per cent, it clearly says that no money shall be taken from one carrier for the help of another until it has earned in *excess* of 6 per cent. Therefore, the order of the Commission was, in addition to being confiscatory, in defiance of the expressed will of Congress.

Since on the Commission's own data and its own peculiar method of calculation the record discloses that 11

of the 13 appellees would fail to receive operating expenses out of the divisions, the holding of the District Court must be sustained. Even as to the remaining two appellees, the decision of the District Court should be affirmed because there is nothing in the record dealing with the efficiency with which the Orient is operated, the amount necessary to pay operating expenses of appellees and other expenses and a fair return on their property, and nothing as to "whether any particular participating carrier is an originating, intermediate or delivering line," all of which are required by the command of Congress in the Act.

VI.

THE ORDER MADE BY THE INTERSTATE COMMERCE COMMISSION IN THIS CASE WAS FINAL, AND THEREFORE THE CARRIERS HAD A RIGHT TO APPLY FOR INJUNCTIVE RELIEF WITHOUT PETITIONING THE COMMISSION FOR FURTHER HEARING. THEIR REMEDY AT LAW WAS INADEQUATE.

In the brief for the Commission (p. 12) it is contended that as the order of the Commission was entered by Division 4 (Trans., 10), the carriers should have applied to the whole Commission for suspension rather than to the Court for injunction.

The provisions of Section 16a relating to further hearing, which section was added to the Interstate Commerce Law in 1906, say that "any party thereto *may* at any time make application for rehearing" and that "it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear." Later in the section it is provided that on such rehearing, if it appears from the facts, "including those arising since the former hearing," the decision should be modified, "the Commission *may* reverse,

change, or modify the same accordingly." Those provisions were designed to meet well-known matters, namely, that neither the carriers nor the Commission could tell how an order would work out in practice, and also that in experience many orders of the Commission which appeared to be sound at first set things topsy-turvy.

The practice is the same as it is in the law courts—a party may apply for rehearing or not, according to the dictates of his best judgment. It has been held in the Federal courts that failure of a trial court to grant a rehearing cannot be assigned as error, as the granting of such a petition is a matter of discretion.

It so happened that five months before this case was tried an order was made in another case by a division of the Interstate Commerce Commission and then when the carriers filed a petition for rehearing before the full Commission the application was granted, but with the provision that the divisional order "shall be and remain in full force and effect."

*Missouri & North Arkansas Divisions, 68 I. C.
C. 47.*

That case is still pending. Should it ever be determined in favor of the contesting carriers, their divisions will be irreparably gone. In the Missouri and North Arkansas case the line had never been operated more than a few months at a time. In such circumstances the remedy at law is in no sense adequate.

The brief for the Commission cites (p. 15) *Prentis v. Atlantic Coast Line*, 211 U. S. 210, to prove that we should have petitioned from the Division to the whole Commission. The Prentis case is not parallel. There the Court of last resort in Virginia had legislative jurisdiction over rates; and consequently when application was made to the Federal Court the last word on a legis-

lative subject had not been spoken by the State of Virginia. But here the legislative order of the Division was made final by Congress.

Section 17 (4) of the Interstate Commerce Law, which section authorizes the Commission "to divide the members thereof into as many divisions (each to consist of not less than three members) as it may deem necessary," provides:

"Any order, decision, or report made or other action taken by any of said divisions in respect of any matter so assigned or referred to it shall have the same force and effect, and may be made, evidenced and enforced in the same manner as if made or taken by the Commission, subject to rehearing by the Commission, as provided in Section 16 (a) hereof for rehearing cases decided by the Commission."

Section 16 (a), referred to in the foregoing language, simply provides that a case before the Commission is always open for rehearing and that the Commission may at any time modify its decision. The permission granted in the language of Section 17 (4), just quoted, is for such a rehearing before the whole Commission as might be given in a case which the whole Commission had decided.

Section 16 (a) provides very heavy penalties for failure to comply with an order of the Commission and "every distinct violation shall be a separate offense." Where the violation is continuous "each day shall be deemed a separate offense." In addition to that, Section 16 (a) denies to appellees an adequate remedy at law should the Commission decline to suspend its order and should be finally held that the reduction of their divisions in favor of an insolvent company was unjustified (italics ours):

"Applications for rehearing shall be governed by such general rules as the Commission may establish. *No application shall excuse any carriers from com-*

plying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof without a special order of the Commission."

As the "special order of the Commission" was denied in the Missouri and North Arkansas case, why should a petition for further hearing have been made in this case?

Where the carrier will suffer irreparable damage in case its application to the Commission for rehearing should be denied and the order of the Commission should finally be held to have been invalid, then it cannot be said that it has an adequate remedy at law.

Thus, where revisions of the tax laws of Colorado left it in doubt whether a taxpayer could get relief which was plain to him under earlier statutes, the Supreme Court of the United States, reviewing the history of the legislation and the facts involved, held:

"In these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law. On the contrary, the existence of such a remedy is debatable and uncertain, and this, being so, the situation is not one in which cognizance of the present suit properly can be declined."

Union Pacific v. Weld County (June, '18), 247 U. S. 282.

The plaintiffs here had no certain remedy before the Commission. Indeed, the Commission had warned the carriers once in a similar case, and had warned them in many other cases, that its orders must go into effect at the time specified. The Commission had been directed by Congress, as we have seen, to put its orders into effect.

But apart from all those considerations, the order by the Division is made final by the law, and therefore the

carriers had the right to apply to a court to set aside "any order made or entered by the Interstate Commerce Commission." On this point the District Court said:

"The application for a rehearing does not operate to stay the execution of the Commission's order. The act provides that it be not stayed on such an application unless the Commission by special order grants a stay. Nothing could have been done by plaintiff's pending application for rehearing that would have stayed the execution of the order as a matter of right. We think plaintiffs were entitled to take the order as final for the purpose of this proceeding."

There can be no serious difference of opinion on this point.

VII.

CONCLUSIONS.

From the foregoing examination of the record these propositions are plain:

1. That the Commission made the primary mistake of not providing money before it attempted to divide it.
2. That it gave no consideration to the command of the law to ascertain whether the Orient is well managed—the first question to which it should have found an answer.
3. That it made no inquiry into the financial condition in which the divisions prescribed would leave the connections of the Orient.
4. That its method of reaching its "finding" was far-fetched, arbitrary, and wholly inconclusive.
5. That there was no evidence to show that any division accorded to the Orient was "unjust, unreasonable, inequitable or unduly preferential or prejudicial"

within the law; and that the record was entirely without evidence to support the order in any way.

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GARDINER LATHROP,
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United States Court, U. S.
APPEALS

FEB 26 1926

No. 488.

W. R. STANSBURY
Solicitor

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants.

vs.

ABILENE & SOUTHERN RAILWAY COMPANY,
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
THE CLINTON & OKLAHOMA WESTERN RAILROAD COMPANY,

FORT WORTH & DENVER CITY RAILWAY COMPANY,
THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,

GULF, COLORADO & SANTA FE RAILWAY COMPANY,
MIDLAND VALLEY RAILROAD COMPANY,
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS
(C. E. Schell, Receiver),

MISSOURI PACIFIC RAILROAD COMPANY,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
THE TEXAS & PACIFIC RAILWAY COMPANY (J. L. Landau
and Charles L. Wallace, Receivers),

THE WICHITA FALLS & NORTHWESTERN RAILWAY COMPANY,

Appellees.

BRIEF FOR APPELLEES DEALING SOLELY
WITH LEGAL QUESTIONS ARISING FROM
RECORD MADE BEFORE INTERSTATE
COMMERCE COMMISSION.

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Francisco Railway Company.

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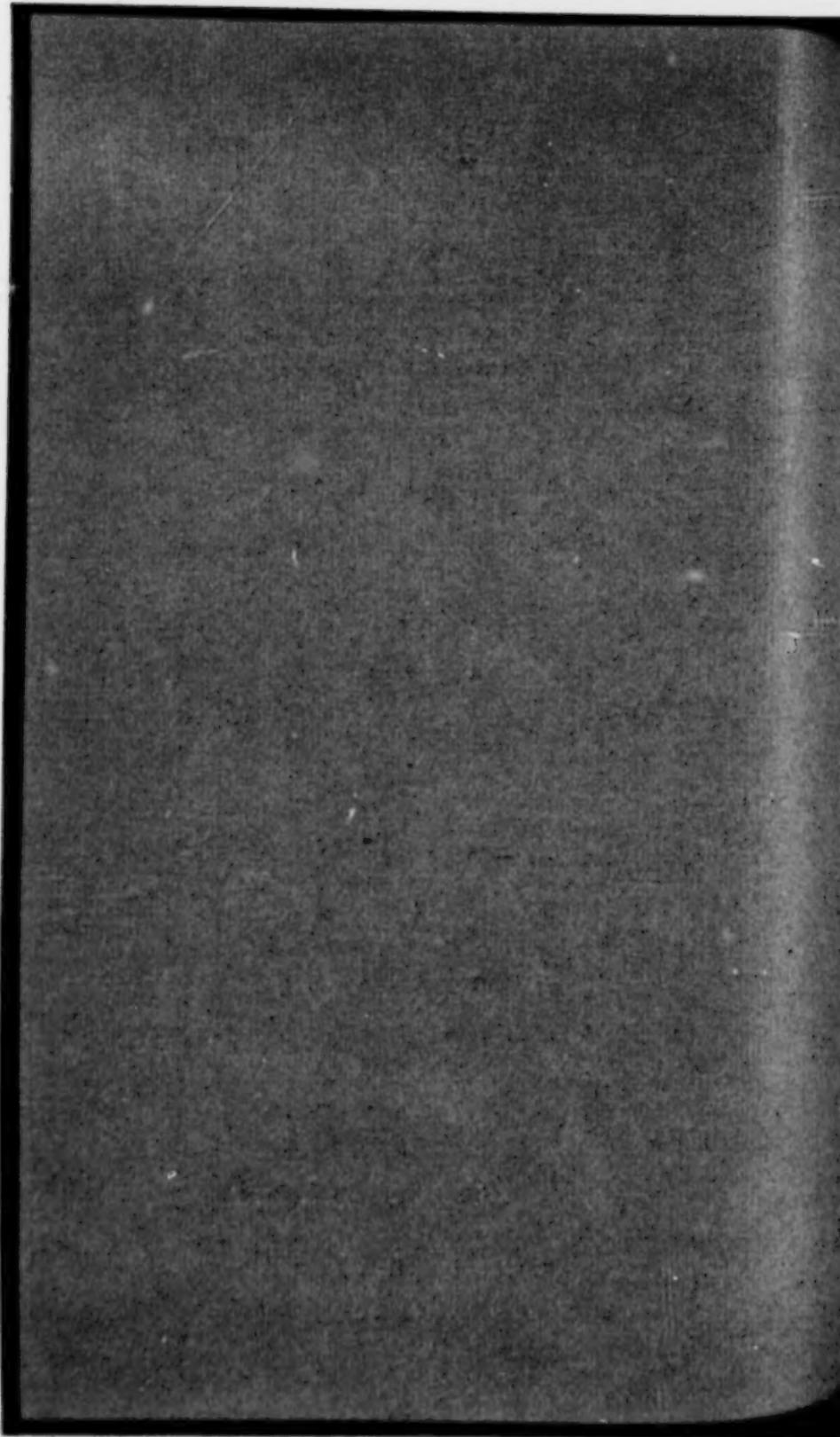


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No. 456.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

ABILENE & SOUTHERN RAILWAY COMPANY,
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
THE CLINTON & OKLAHOMA WESTERN RAILROAD COMPANY,
FORT WORTH & DENVER CITY RAILWAY COMPANY,
THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,
GULF, COLORADO & SANTA FE RAILWAY COMPANY,
MIDLAND VALLEY RAILROAD COMPANY,
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS
(C. E. Schaff, Receiver),
MISSOURI PACIFIC RAILROAD COMPANY,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
THE TEXAS & PACIFIC RAILWAY COMPANY (J. L. Lancaster
and Charles L. Wallace, Receivers),
THE WICHITA FALLS & NORTHWESTERN RAILWAY COMPANY,

Appellees.

BRIEF FOR APPELLEES DEALING SOLELY WITH LEGAL QUESTIONS ARISING FROM RECORD MADE BEFORE INTERSTATE COMMERCE COMMISSION.

I.

STATEMENT OF FACTS BEARING ON THE LEGAL ISSUES INVOLVED HEREIN.

In so far as the record made before the Interstate Commerce Commission in this case is concerned, no disputed questions of fact are involved and the case turns entirely upon strictly legal issues.

However, a brief resume of the proceedings before the Interstate Commerce Commission as disclosed by a certified copy of the record before that body filed herein is necessary to properly understand the legal questions raised.

William Kemper, as Receiver of the Kansas City, Mexico & Orient Railway Company, and the Kansas City, Mexico & Orient Railway Company of Texas, composing the railroad known as the Orient System, filed a joint application before the Interstate Commerce Commission praying *inter alia* for an order "applicable to the division of rates, fares and charges" (Rec., pp. 3-15*).

The complainants in their application before the Commission *did not allege* directly or by inference that the *divisions* of joint rates accruing to them *were unreasonable, unjust or unduly discriminatory* (Rec., pp. 3-15). The applicants in their complaint *relied solely* upon the theory of law that the federal rate regulatory body had the power to equalize the earnings of weak and strong lines by transferring the funds of one to the other *under the guise of divisions*. The complainants tried their case, as will be herein-after disclosed, *solely* upon that theory of the law.

In their brief filed before the Interstate Commerce Commission, the complainants clearly disclosed that

*The page references in this brief refer to the pages of the printed record before the Commission and which is on file in this case.

they were not relying for an increase in the divisions of the Orient *on the theory that those divisions* of the joint rates *were unreasonable* either *per se* or relatively, but that the law authorized the Commission to transfer the funds of the strong line to a weak line for the purpose of enabling it to pay operating expenses (Rec., pp. 37, 55, 56, 62).

Furthermore, the Commission also clearly understood that the complainants were not asking for an increase in their divisions *because those divisions were unreasonable* or inequitable for the service performed, but because the complainants *needed the money* to pay their operating expenses, taxes and interest on the loan. As proof of the foregoing we quote from the Commission's report (Rec., pp. 395, 396-398) :

"The Orient alleges that its revenues are insufficient to enable it to pay operating expenses, taxes and a fair return on the property held for and used in transportation service, or to enable it to perform properly its function as a common carrier, and contends that this condition can be remedied only by increasing its divisions of joint freight rates, or by increasing, through changes in routing, the amount of traffic it handles as an intermediate carrier. The request for changes in routing of trame is before us in a separate proceeding * * *. In making its plea for increases in divisions and changes in routing of traffic, the

Orient asks only a sufficient measure of relief to enable it to continue operation and makes no request for a return upon investment * * * (Rec., p. 398). Various methods of increasing its revenues have been suggested (402) * * *. As above stated, the Orient is seeking only such revenue as will enable it to operate the road and is asking nothing for its security holders" (Rec., p. 405).

Three witnesses testified for the complainants before the Interstate Commerce Commission. *None of them testified that the divisions accorded the Orient Railway by the appellees herein were unjust, unreasonable or inequitable.* In fact, no testimony was introduced before the Interstate Commerce Commission tending to establish the contention now made that the *divisions of the joint rates were unjust or unreasonable.* The complainants introduced *no evidence* to show *what the divisions of the joint rates were* at the time of the hearing or at any other time. *No divisional sheets were introduced in evidence.* There is not a single iota of testimony in the record before the Interstate Commerce Commission showing or tending to show that the divisions accruing to Orient are unjust or unreasonable. On the contrary, Mr. Shaufler, the main witness for the Orient, and an expert traffic man, proceeded in his testimony upon the *sole theory* that under the law as it is today, a

weak line has the right to share in the earnings of a strong line in order to defray its operating expenses, as will be seen from the following testimony:

"A. It might be appropriate to say at this time that the investors and security holders of the property are not asking anything at this time for increased divisions or additional traffic in—

Mr. Boyd (Q.): Let me put that in another way, Mr. Shaufler; in your statement which you have offered here and exhibits in which you have attempted to show the needs of the Orient System for 1922, has there been included in that statement a single item to pay interest or dividends or any return to investors?

A. No, sir.

Q. The needs which you have offered here are merely for paying operating expenses, taxes and the interest on the Government loan?

A. Yes, sir.

Q. And deferred maintenance?

Mr. Wood (Q.): What needs are you talking about?

A. Needs for operating the railroad.

Q. That is, the purpose of this proceeding is to secure readjustments of divisions which will make revenue sufficient to take care of the operating expenses and the deferred maintenance and the interest on the Government loan? That is the purpose of the proceeding?

A. And that is all.

Q. Is that it?

A. Yes, sir. We are not asking for any return for the investors. All we want is to be able to

continue to operate the property at this time (Pr. Rec., pp. 57, 58).

Q. Your theory is that the Commission ought to require these respondents to make good to you the losses that have been imposed upon you by the order of the same Commission; is that what you are asking to have done?

A. We ask the Commission to be permitted to live. We are not asking anything for the security holders. It is just a question of being permitted to operate the railroads until such time as the security holders can find their way clear to complete the Orient Railroad from Kansas City to Topolobampo.

Q. And you approach this case, as I understand it, solely from that standpoint?

A. From the standpoint of being permitted to operate.

Q. Of receiving by an order of the Commission here such an adjustment of divisions as will permit you to pay your operating expenses during the period of further development of your line?

A. That is it.

Q. *That is your sole method of approach to this case that is here?*

A. *That is right."*

The complainants introduced 26 exhibits. Six of them consisted of maps. Many of the 26 exhibits showed various and sundry statements as to the financial condition of the Orient System. None of them disclosed the division sheets or the contents thereof between the Orient Railway on the one hand and

the appellees on the other, either jointly or separately. In no exhibit introduced before the Interstate Commerce Commission was the Commission informed or given any information *as to how the joint rates* on the *various* commodities *were divided* between the Orient and its connections. A summary of each exhibit is given in the index to the printed copy of the record before the Commission.

In its order setting the case for hearing (Rec., pp. 63-66) the Commission ordered the complainants and petitioners herein to file a statement showing the number of tons and ton-miles of freight interchanged between the complainants and respondents, together with the revenues accruing to each therefrom. Complainants' Exhibits Nos. 24, 25, 26 and 27, and Respondents' Exhibits Nos. 27 and 42, inclusive, are statements which were filed at the hearing in conformity with said order of the Commission.

In its final report (Rec., pp. 394-413) the Commission made a finding in which it stated that "upon the facts of the record *we find* that the *division* of interstate joint rates on traffic interchanged between the Orient and its immediate connections *are unjust, unreasonable and inequitable.*" The Commission further found that "*considering separately the several divisions* of interstate rates on traffic interchanged between the Orient and its connections, and having origin or destination on the Orient, there shall be

deducted from the revenue or proportion accruing under divisions to said connections" the following percentages of the divisions which the Commission ordered should be added to the revenue of the Orient, as follows:

	Per Cent
Abilene & Southern.....	15
Atchison, Topeka & Santa Fe.....	25
Chicago, Rock Island & Pacific.....	20
Clinton & Oklahoma Western.....	10
Fort Worth & Denver City.....	30
Galveston, Harrisburg & San Antonio..	25
Gulf, Colorado & Santa Fe.....	30
Midland Valley	20
Missouri, Kansas & Texas of Texas....	20
Missouri Pacific	20
St. Louis-San Francisco.....	20
Texas & Pacific.....	20
Wichita Falls & Northwestern.....	25

The Commission stated that it *considered separately* the *several divisions* between the Orient and the appellees in the proceeding before it, and after such consideration of the *several divisions* it *found* that *each of them was unreasonably high* to the amount of percentage indicated. If the Commission considered separately the several divisions between the Orient and the appellees, then it considered testimony which was *not offered in evidence* at the hearing; for there is not one iota of testimony in the

record before it *showing what those several divisions were.* It will be the appellees' contention that such finding by the Commission was not based upon evidence, and is without evidence in the record to support it.

In its first order made in this proceeding (Rec., pp. 63-66) the Commission made certain carriers therein named—39 of them—respondents or defendants. The record shows that all of these 39 carriers participated in joint rates with the Orient (Ex. No. 24; Rec., pp. 313-335). In addition thereto, the record discloses that there are scores of other carriers *who were parties to these same joint rates* and who were *not made respondents* or defendants in the proceeding before the Commission. Many of them receive large sums as divisions under joint rates with the Orient System (Ex. No. 24; Rec., pp. 313-325).

Notwithstanding the fact that scores of carriers—some respondents in the proceeding and many not respondents—received revenues from divisions under joint rates with the Orient, the *incidental fact of physical connection* with the Orient determined who *should contribute* and *who should not contribute.* The order in the case only runs against the carriers having direct physical connection with the Orient. For example, such small railroads as the Abilene & Southern and the Clinton & Oklahoma Western—50 miles long—were required to contribute 15 and 10 per cent,

respectively, while such railroads as the Chicago, Burlington & Quincy, Colorado & Southern, Ft. Worth & Rio Grande, Illinois Central, International-Great Northern, Kansas City Southern, St. Louis Southwestern and many other strong carriers who participate in joint rates with the Orient were not required to contribute simply because they did not have physical connection with the Orient Railway. At least, *the test* in determining whether other carriers parties to joint rates with the Orient should deplete their revenues to support the Orient *was the question whether they had physical connection with it.*

It is the contention of the appellees that if the Commission has the power to raise revenues to pay the operating expenses of one carrier by increasing its divisions under joint rates with other carriers, an order requiring the contribution to be made by those carriers which happen to have physical connection with it, is arbitrary and unlawful.

II.

ORDER IS INVALID BECAUSE A TRANSFER OF EARNINGS UNDER DIVISIONS IN VARYING PERCENTAGES FROM THE CONNECTING CARRIERS IN PROPORTION TO THEIR RELATIVE PROSPERITY, AND NOT IN PROPORTION TO THE RELATIVE AMOUNT AND COST OF SERVICE UNDER THE JOINT RATES, IS AN ARBITRARY EXERCISE OF POWER AND CONSTITUTES A VIOLATION OF THE FIFTH AMENDMENT.

The Commission in its decision in this case (73 I. C. 319, L. c. 328) ordered that the several divisions accruing to the connecting carriers under joint rates with the Orient be reduced by certain percentages and that the amounts so deducted from the revenues of the connecting carriers be added to the revenues of the Orient, as follows:

	Per cent
Fort Worth & Denver City Railway.....	30
Gulf, Colorado & Santa Fe.....	30
Wichita Falls & Northwestern.....	25
Atchison, Topeka & Santa Fe.....	25
Galveston, Harrisburg & San Antonio (one of the Southern Pacific Lines).....	25
St. Louis-San Francisco Railway.....	20
Midland Valley	20
Chicago, Rock Island & Pacific.....	20
Missouri Pacific	20

	Per cent
Missouri, Kansas & Texas.....	20
Abilene & Southern.....	15
Clinton & Oklahoma Western.....	10

On page 325 of its report (73 I. C. C. 319) the Commission found from the annual reports on file with it—not introduced in evidence—that the rate of return upon their investments of the foregoing carriers during the year ending December 31, 1921, was as follows:

	Per cent
Fort Worth & Denver City Railway.....	12.13
Gulf, Colorado & Santa Fe.....	10.73
Wichita Falls & Northwestern.....	6.51
Atchison, Topeka & Santa Fe.....	6.27
St. Louis-San Francisco Railway.....	4.77
Midland Valley	4.66
Chicago, Rock Island & Pacific.....	4.24
Abilene & Southern.....	4.09
Missouri, Kansas & Texas of Texas.....	3.42
Missouri Pacific	2.71
Galveston, Harrisburg & San Antonio....	1.88
Clinton & Oklahoma Western.....	1.39

An order transferring the earnings of these connecting carriers from divisions under joint rates with the Orient in varying percentages ranging from 10 to 30 per cent, *depending upon their relative prosperity* or their respective annual returns upon their investments, and *not* in proportion to the relative

amount and cost of service performed by the Orient, on the one hand, and the connecting carriers on the other, *under their joint rates*, as the law contemplates, constitutes an arbitrary exercise of power in violation of the due-process clause of the Fifth Amendment.

The findings and order of the Commission as hereinabove set forth conclusively demonstrate that it sought to augment the revenues of the Orient from the traffic interchanged with its connections *without regard* to the question of whether the present *divisions* of the joint rates are fair and *reasonable* and, what is more to the point, *without regard* to the question as to the relative *amount and cost* of the *service* of each of the said carriers under their respective joint rates with the Orient.

It was and will be said again that this seizure of earnings in varying percentages depending upon the prosperity of each line for the purpose of subsidizing the Orient was done "*to foster public interest.*" A highwayman who takes my purse is nevertheless guilty of a crime, though he may *unctuously announce* that the contents are to be used *for public charity.* The annals of the courts in construing the Fourteenth and Fifth Amendments are replete with instances and illustrations of attempts to confiscate property upon the ground of public safety, *public welfare* or *public interest.* No matter how high the motive, how de-

serving the object, the property of one person cannot be taken for public interest or otherwise without just compensation or without due process of law.

The principle of law governing the distribution of funds from joint rates, i. e., divisions, is well settled. It was clearly and succinctly stated by the Commission in the New England Division case (66 L. C. C. 196, l. e. 198, 199) as follows:

"The thought dominates the law, as it is now framed, that a paramount consideration in determining the equitable share of the joint revenue which any carrier shall receive must be the relative *amount* and *cost of service* which it renders * * *. Summing up this phase of the matter, we are of the opinion * * * that the *relative amount* and *cost* under economical and efficient management of the *service rendered* is a prime factor in determining the fair and equitable share of joint revenue which each carrier shall receive."

The *manner* and *method* which the Commission adopted in increasing the divisions of the Orient conclusively demonstrate that the *relative amount* and *cost of service*, respectively, under the joint rates were wholly ignored in determining the proportion of the joint revenue which the Orient should have. On the contrary, the foregoing tables demonstrate that it was the *respective financial ability* of the various

connections to contribute a sum for the support of the Orient that *decided* the *amount* which *each should pay.*

This important fact should not be overlooked. No evidence was introduced in this record to show that the *amount* and *cost of service* by the Orient on the traffic which it interchanged with the *more prosperous roads* was *greater than* the *cost* and *amount* of service which the Orient performed on the traffic interchanged with the *less prosperous roads.*

It is interesting to observe how the Commission determined the *relative* contributions under the guise of increasing the Orient's divisions. The *most prosperous road*, Fort Worth & Denver, was *required to contribute 30 per cent* of its total earnings under the joint rates. A similar slice was taken from the Gulf, Colorado & Santa Fe, which was *fortunate enough to earn 10.73 per cent* during 1921. That disposed of the carriers earning 10 per cent and more.

The next to be taken were the carriers which earned 6 per cent and more. *Twenty-five per cent* was taken from the Santa Fe and the Wichita Falls & Northwestern. Then the carriers in the next lower class were attacked. *Twenty per cent* was taken from the Frisco, Midland Valley, Rock Island, Katy, Missouri Pacific and Texas & Pacific, though the latter three did not earn quite as much as the first three. The short railroad in Texas, the Abilene & South-

ern, although it earned 4.09 per cent, escaped with only a cut of 15 per cent of its earnings. The Clinton & Oklahoma Western was the most fortunate. It escaped with a levy of 10 per cent; but its earnings during 1921 were the lowest of all. The only exception to the rate of progression was the Galveston, Harrisburg & San Antonio, whose earnings during 1921 were 1.88 per cent, and which was required to *pay 25 per cent of its earnings*, but this railroad forms a component part of the wealthy and prosperous Southern Pacific System; hence the apparent exception is explained.

It is inconceivable to us that any court under our laws will sanction a legal formula by which divisions accruing to one carrier *are to be fixed and determined* by the *amount of money* which other carriers, parties to joint rates, *may have made*. That is communism, pure and simple. The Interstate Commerce Commission has never heretofore in any final decision applied that formula or advanced that rule. To determine just and equitable divisions accruing to a carrier by the *respective rates of return* on the property investment of its connections is vicious, inherently unsound, capricious and arbitrary. The adoption of such a rule by the Commission and the courts *will condemn efficiency, discourage economy and insured the profligacy of shiftless carriers*. The courts and commissions *are not created to equalize the fortunes of men or of carriers*.

An order which results in the transfer of money, the property of certain carriers, to another carrier, *not in consideration of any service rendered* by that carrier, is invalid. If after considering the rates involved, the method by which those rates *are divided* between the carriers, and the relative *cost* and *amount of service*, the Commission finds, in a division case, that one carrier is entitled to higher divisions, it has heretofore been the practice of the Commission to grant the increase in one of two ways, either in specific amounts in cents per hundred pounds or per ton, or by a percentage increase proportionate to the amount and cost of the service. Thus, in the Denver & Salt Lake Division Case, decided August 3, 1922, 73 I. C. C. 178, the Commission allowed the Denver & Salt Lake an increase of 50 cents per ton in its divisions. In the New England Division case, decided January 30, 1922, the Commission permitted the New England carriers an increase in their divisions of 15 per cent.

But in this case no such method was followed. The Orient was granted an increase in its divisions, *not measured by its own cost and service*, but it was granted a proportion of the amount of revenue which its connections received for *their services*. The anomalous and arbitrary result of the order may be illustrated. Let's assume that there is a joint rate in effect—we are compelled to make an assumption be-

cause no rates were introduced in evidence—of \$1.00 per hundred pounds from a town on the Orient 25 miles from Wichita, Kansas, to a point on the Santa Fe in California. Let us suppose that the rate divides this way: 20 cents to the Orient and 80 cents to the Santa Fe; that is, 20 per cent to the Orient and 80 per cent to the Santa Fe. The Commission did not, as it has always heretofore done, increase the Orient's division by a specific amount or by a certain percentage thereof, so as to adjust its divisions to its service and cost, but it deducted from the revenue of the Santa Fe *for its service from Wichita to California 25 per cent and ordered it turned over to the Orient.* Certainly a fourth of the earnings of the Santa Fe for the transportation of the commodity from Wichita to California *cannot possibly represent* the increased *cost to the Orient* of transporting commodity *from its station 25 miles to Wichita.* The principle adopted is inherently wrong. Under the illustration given, the divisions of the Orient are increased not 5, 10, 15, 20 or 25 per cent, but are increased 100 per cent; that is, 20 cents is taken off the Santa Fe's revenues and added to the Orient's revenues, which enables the Orient to get *40 cents* for hauling the commodity to Wichita and the Santa Fe *60 cents for hauling it to California.*

III.

ORDER OF COMMISSION IS INVALID BECAUSE
IT CONCLUSIVELY APPEARS AND IS ADMITTED IN ITS BRIEF THAT THE COMMISSION ARRIVED AT ITS CONCLUSION UPON STATISTICAL DATA AND INFORMATION NOT INTRODUCED IN EVIDENCE AT THE HEARING BEFORE IT.

In deciding this case, the Commission, as admitted in the briefs (see I. C. C. Br., p. 30) and as its report and certified copy of the record disclose, based its findings largely upon statistical data and information not formally offered or introduced in evidence at the hearing.

There can be no valid order by an administrative body acting in a semi-judicial capacity based upon a hearing where the parties to the litigation did not know what evidence was being considered *and are not given an opportunity to explain or refute it*. Parties to a litigation before an administrative body must be fully apprised of the evidence *considered* and must be given the opportunity to inspect documents and offer evidence in explanation (Interstate Commerce Commission v. L. & N. R. R. Co., 227 U. S. 88, l. e. 93; Whitfield v. Hanges et al., 22 Fed. 745, l. e. 749).

On page 325 of the Commission's report (73 I. C. C. 319), containing its findings, which report was made a part of the order, will be found a table giving certain statistical information for the year ending December, 1921, concerning the respondents in the case before the Commission. For example, the table shows the gross revenues of the connecting carriers respectively per ton mile, per car mile; per train mile; operating expense per train mile, per car mile, per ton mile; net revenue per ton mile, per car mile, per train mile; the return per thousand dollars investment, on the gross revenue, the net revenue and railway operating income; the percentage of return on the gross revenue, the net revenue and under operating income. From the foregoing data, so shown in the said table, the Commission, on page 326 of its report, draws various and sundry conclusions concerning the Orient, on the one hand, and the connecting carriers on the other. With the single exception of a net railway operating income for all connecting lines, which is shown in Exhibit No. 17, *none of the foregoing statistical data was introduced in evidence.*

In order to make the compilations shown on page 325 of its report, it was necessary for the Commission to have had before it the following data for all lines: Freight tons, one mile; passengers, one mile; all revenue car miles; all revenue train miles; the

total operating revenue; total operating expenses; net revenue and investment in road and equipment. *None of the foregoing data was introduced in evidence.* It is true that the record shows the total operating revenue, the total operating expenses, the net revenue, the net railway operating income, the investment in road and quipment of the Orient System, but none of the foregoing information *as to all respondent carriers was introduced in evidence.* Neither was the freight tons one mile, the passengers one mile, the all-revenue car miles and the all-revenue train miles of the Orient System shown in evidence. The operating revenues and operating expenses of the Orient System for the year 1921 are contained in Exhibit No. 11. Investment in road and equipment of that company, as of December 31, 1921, was contained in Exhibit No. 16, but *as to all the other information so shown in the report of the Commission and the deductions drawn therefrom, the record is absolutely silent.*

In the dissenting opinion of the court below the action of the Commission in this regard was justified by reason of the following sentence in Rule XIII of the Rules of Practice before the Interstate Commerce Commission:

“This Commission will take notice of items in tariffs and annual and other periodical reports of

carriers properly on file with it, or any annual, statistical and other official reports of the Commission."

But this contention is not tenable, for the following reasons:

First. Rule XIII, when considered as a whole, clearly contemplates that if a litigant desires the Commission to consider such matters in a proceeding before it the party *must offer* such portions of such tariffs or annual reports as it desires the Commission to consider. This will enable the opposing litigant *to explain or refute it* and thereby the rights of the parties are fully preserved.

Second. If it be contended that by reason of such rule the Commission in any particular proceeding before it may consider data from the annual reports which are on file with it *without being introduced in evidence*, then the *rule is invalid*, because it deprives a litigant of his constitutional rights; for all parties to a litigation must be fully apprised of the evidence submitted or *to be considered* and must be given the opportunity to inspect documents and *to offer evidence in explanation or rebuttal* (I. C. C. v. L. & N. R. R. Co., 277 U. S. 83, l. c. 93).

Third. It is claimed that the appellees were not prejudiced and that "the carriers were not subjected to injustice" by reason of the fact that the Commis-

sion considered data from annual report on file with it. The annual reports of carriers to the Interstate Commerce Commission contain a *multitude* of data and a *great variety* of statistical information. The Commission's records contain hundreds of such reports. It was impossible for the carriers to anticipate in advance *just what* information or *data* the Commission would consider or what inference it might draw therefrom. The appellees were entitled as a matter of right to know the data which the Commission was going to consider in order that they might have an opportunity to explain or to refute it. Even pleadings filed by litigants in the same court in former cases cannot be considered as evidence or admissions unless introduced in evidence in the particular case before the Court. The same rule should apply before the Commission. It will not do to say that the facts contained in the annual reports were true in any event and that, therefore, the appellees were not hurt; for the rule that the opposing litigant *must know* the evidence *to be considered* against him applies to *truthful* evidence as well as to evidence *which is not true*.

IV.

ORDER OF COMMISSION IS INVALID BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUSTAIN IT.

The issue in this case before the Commission was whether the respective *divisions* of joint rates on *various* commodities between the Orient, on the one hand, and the respondents, on the other, were reasonable. Divisions are nothing more or less than *unpublished rates*. While rates are published and filed with the Commission, division sheets are not so filed. When a shipper attacks the unreasonableness of a rate, his first burden is to show its evidence *to rate itself as contained in the tariff*; for without the rates properly before it no administrative or judicial body can pass upon their reasonableness (*I. C. C. v. Railway*, 227 U. S., I. c. 83). As a general rule, the same factors in determining the reasonableness of rates are considered by the Commission in passing upon the reasonableness of divisions.

On page 327 of its report (73 I. C. C. 219) the Commission stated that it *considered "separately the several divisions of interstate rates on freight interchanged between the Orient and its connections and having origin or destination on the Orient."* If the

Commissioner to consider the *actual divisions*, then it must have considered testimony which was not introduced at the hearing.

We submit that it is impossible for a body, administrative or judicial, to determine whether the *present divisions* between the Orient and the Pines, for example, on the various commodities interchanged, are *just* or *unjust* to the Orient, unless the *Court* or the Commission *knows how the present ratio* on the *various commodities are divided* between those parties, that is, unless the *Court* before the Commission discloses the *percentage of the portion* of the *joint sales* which the Pines *receive*, and the *percentage of the portion* of the *joint sales* which the Orient *receives*. These *negative proportions* of the sales for each line are *certified* and shown in what are known as *railway schedules* as "division charts," which are *formulated*, agreed to, *promulgated* and *published*, but not usually filed with the Interstate Commerce Commission. As the division charts showing how the sales are divided or apportioned between the Orient and the Pines, for example, were not introduced in evidence, and as neither the *written basis* *thereof were disclosed* in any way in the record, the Commission had no legal or competent *vidence* to determine whether the *present divisions* in effect between the Orient and the Pines are *just*.

In the New England Division Case, 66 L. C. C. 196, l. e. 200, affirmed by this Court in 261 U. S. 184, which involved the reasonableness of the divisions of joint rates, the Bangor & Aroostook Railway Company did not introduce in evidence *its division sheets, nor did it show the divisional arrangements between it and the other carriers.* The Commission held that no finding, under these circumstances, could be made with respect to those divisions or the reasonableness thereof. It further appeared in that case that the divisional arrangements on certain classes and commodities were introduced in evidence, and the Commission confined its finding *solely to the commodities and classes of traffic as to which the division sheets were shown.* Said the Commission:

“The divisional arrangements shown apply to class rates and generally to the commodity rates on articles which are classified. There is no evidence with respect to the divisions on coal and coke, fluid milk and its edible products, high explosives or certain low-grade commodities moving short distances. *Nor were divisions of the Bangor & Aroostook Railroad shown. Findings cannot be made with respect to any of these divisions,* and complainants do not now ask for such findings. On the other hand, defendants made no offer to prove that divisions in such cases are so favorable to complainants as to make up for deficiencies elsewhere, and the absence of

evidence in regard to the divisions of certain rates constitutes no reason for failure to act upon the divisions *as to which there is evidence*. With respect to the latter, complainants submitted exhibits *showing the divisions* as between the New England roads and their western connections of several thousand joint rates applying between every division block of complainants other than the Bangor & Aroostook and representative points of traffic importance in all parts of the eastern group. One of the principal witnesses for defendants testified that the selection was *illustrative and fair* (pp. 200, 201) * * *. As already stated, evidence is lacking in regard to the divisional arrangements on certain specified classes of traffic. Our action will be restricted to the divisions of class rates and of the commodity rates which divide on the class-rate basis (p. 205) * * *. We find, therefore, that the divisions of the joint class rates here under consideration and of the similar joint commodity rates which divide on the class-rate basis, other than those in which complainant, the Bangor & Aroostook Railroad Company, participates, will for the future be unjust, unreasonable and inequitable to the extent that complainants' divisions thereof shall be less than 115 per cent of their present divisions" (p. 206).

Under the law, the prime factors in determining the reasonableness of divisions are the (a) *relative amount* of the service, i. e., the haul, and (b) the *rela-*

tive cost of the *service*, i. e., the haul, of each carrier participating in the joint rate.

In the New England Division case, 66 L. C. C. 196, L. c. 198, 199, decided January 30, 1922, the Commission said:

"The thought dominates the law, as it is now framed, that a paramount consideration in determining the equitable share of the joint revenue which any carrier shall receive must be the relative *amount* and *cost* of the *service* which it renders * * *. Summing up this phase of the matter, we are of the opinion * * * that the relative *amount* and *cost* under economical and efficient management of the *service rendered* is a prime factor in determining the fair and equitable share of joint revenue which each carrier shall receive."

Illustrating the foregoing principle, let us assume that the rate on some commodity from station A on the Orient to station B on the Frisco is 60 cents per hundred pounds, and that the haul, i. e., the service, from A to B is 300 miles, 200 miles over the Orient and 100 over the Frisco. According to the relative amount of service, i. e., the haul, the rate should, therefore, be divided as follows: 33½ per cent to the Frisco and 66⅔ per cent to the Orient. But if the cost of service is greater on one road than the other, the division of the rate on the mileage basis—

commonly referred to as the mileage prorate—should be modified to the extent that the relative cost of the service, i. e., the haul, is greater on one line than on the other.

In a division case, therefore, the record must disclose the amount and cost of the service rendered *under the joint rates* by the respective carriers party thereto. The Commission has so held time and again as will be seen by cases hereinafter cited. The proposition is elemental. No administrative body, without acting arbitrarily, can fairly decide the proper proportion due each carrier unless it is fully advised by the record as to what the respective divisions are and as to the *amount of service* that each performs and the *cost of service* of each of the carriers. This record does not disclose the amount of the service which the Orient, for example, performs *under its joint rates* with the Frisco. On the other hand, the record does not disclose either the amount or the cost of the service on the Frisco. The same is true as to other carriers.

It is true that there are some cost figures given on page 325 of the Commission's report (73 I. C. C. 319), but these cost figures relative to the cost to the respondents of their tonnage *as a whole* and they do not show the average cost of the service which they performed *under the divisions* of the joint rates with the Orient. Moreover, the cost figures given on

the same page as to the Orient Railroad deal with its traffic *as a whole*, local as well as joint. This record is entirely barren of any evidence as to the relative value, cost or amount of the respective services performed under the divisions. Besides nearly all the data on page 325 of the report was not introduced in evidence but was later taken from reports on file with the Commission. (See point III, *supra*.)

The Commission has held in the following cases that in a proceeding where the reasonableness of divisions are involved, the record must show the relative amount and cost of the service.

Pittsburgh & West Virginia Ry. Co. v. Pittsburgh & Lake Erie Ry. Co., 61 I. C. C. 272; Louisville & Nashville Railroad Coal and Coke Rates, 50 I. C. C. 54, l. e. 57, 58; Class Rates from Chestnut Ridge Railway stations, 50 I. C. C. 152, 153; Federal Valley Railroad Co. v. Toledo & O. R. R. Co., 68 I. C. C. 499; Wichita Falls & N. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 69 I. C. C. 68.

The Interstate Commerce Commission, in its brief herein, fully recognizes the force of the foregoing contentions of the appellees, but it seeks to avoid the effect thereof by arguing that there was evidence in the record from which the Commission could deduce what

the divisions were and the relative amount and cost of service. In so far as the hiatus in the proof by reason of the absence of any division sheets or the contents thereof, the Commission in its brief, page 41, referred to Exhibits Nos. 25 and 26, which show the tons, ton miles, total revenue and earnings per ton mile on all traffic interchanged between the Orient, on the one hand, and its immediate connections, on the other, during the year 1921. But the showing in these two exhibits cannot possibly disclose directly or by inference the contents of the several division sheets on the classes and the commodities interchanged for the following reasons:

First. The Commission, in its report, stated that it considered "*separately* the *several* divisions of interstate rates on freight *interchanged* between the Orient and *its* connections and having origin or destination on the Orient," and that after such consideration of the *several divisions*, it found that *each of them* was unreasonably high to the amount of the percentage indicated (73 I. C. 319, l. c. 327, 328). The information contained in Exhibits Nos. 25 and 26 does not in any way or in any manner show "*the several divisions* of interstate rates on *freight* interchanged between the Orient and *its* connections." A mere showing of the amount of the tonnage, the total revenue and the earnings per ton mile in an ordinary rate case does not establish what the rates are on the

various commodities carried any more than they establish what *the varying divisions are* on grain, coal, cotton, live stock and other classes of traffic.

Second. This case only involves the divisions under joint *interstate* rates, while the tons, ton miles, total earnings and earnings per ton mile shown in Exhibits Nos. 25 and 26 cover *all* freight traffic interchanged between the Orient and its connections, *intrastate* as well as interstate. They cannot possibly, therefore, show the divisions or the result of the divisions on *interstate* traffic.

Third. The record before the Commission in the New England Division case (66 I. C. C. 196, affirmed by this Court in 261 U. S.—184)—showed as to all Class I railroads, individually and in the aggregate, the operating ratio, tons of freight, tons per mile of road, average receipts per ton, average receipts per ton mile, average haul (Exhibits Nos. 6, 16, 17, 20, 24, 28, 111, 112, 113, 114, 117, 125, 172, 173 therein); but the Commission nevertheless properly *held* that it would not fix divisions on traffic *as to which the divisions were not shown*. “Nor were divisions of the Bangor & Aroostook shown. Findings cannot be made with respect to any of these divisions” (66 I. C. C. 196, l. e. 200).

Fourth. Judge Kennedy, in his dissenting opinion

herein, when this case was before the court below, said (288 Fed. 102, l. c. 119) :

“It is admitted, however, by both sides to this controversy, that the per-ton-mile basis is not a fair one for sole use in determining divisions. So many different elements enter into the determination of cost of service that the ton mile should be considered only as one element.”

Certainly an exhibit which shows the data from which the ton-mile earnings on the traffic *as a whole* may be deduced does not throw any light as to the reasonableness of the *several* divisions on *coal, grain, live stock, cotton and other commodities* carried under joint rates.

Fifth. In its brief the Interstate Commerce Commission argues that facts as to the *relative cost of service* were shown (pp. 43-45). It relies upon the table in the Commission’s report. We have already shown herein elsewhere that *nearly all the data* shown in this table *was not introduced in evidence*, but was gleaned by the Commission from certain annual reports on file with it. The chain of proof necessary to sustain an order cannot be supplemented by facts *not of record* in the case.

The Attorney-General in his brief seeks, apparently, to convince the Court that it was not necessary to introduce division sheets because counsel for the Frisco

at the hearing before the Commission said that he did not care to know the “subdivisions between Chicago and El Paso” (Attorney-General’s Brief, p. 20). The attorney representing the Frisco was not interested in the divisions between Chicago and El Paso, but was interested in the *divisions between the Orient and the Frisco*. The Frisco reaches neither El Paso nor Chicago. Certainly a casual remark of that kind as to divisions to which his railroad was not a party cannot be construed as an admission that the appellees waived the right to have such proof. No such point is made in the brief of the Interstate Commerce Commission herein. Furthermore, Exhibit No. 14, referred to by the Attorney-General, *does not show any division between the Orient Railway on the one hand and the immediate connections on the other*. It relates solely to transcontinental traffic.

V.

ORDER IS INVALID BECAUSE OF FAILURE
TO JOIN AS DEFENDANTS OR RESPOND-
ENTS OTHER CARRIERS WHO PARTICI-
PATED IN AND WHO WERE PARTIES TO
THE SAME JOINT RATES.

The record discloses that only 39 carriers who were parties to joint rates with the Orient were made respondents or defendants in this case. The other

defendants who are parties to those same joint rates were not made parties to the proceeding. The names of the other carriers appear in Exhibit No. 24 (Rec., pp. 313-325).

Paragraph 4 of Section 1 of the Interstate Commerce Act reads as follows (41 Stat. L. 474):

“It shall be the duty of every common carrier subject to this act, engaged in the transportation of passengers or property * * * in case of joint rates, fares or charges, to establish just, reasonable and equitable divisions thereof as between the carriers subject to this act *participating therein* which shall not unduly prefer or prejudice *any* of such participating carriers.”

Paragraph 6 of Section 15 of the Interstate Commerce Act reads as follows (41 Stat. L. 484):

“Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares or charges applicable to the transportation of passengers or property are or will be unjust, unreasonable, inequitable or unduly preferential or prejudicial as between the *carriers parties thereto* (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission *shall*, by order, prescribe the just, reasonable and equitable divisions thereof *to be received by the several carriers.*”

The foregoing statute provides that if the Commission is of the opinion that the division of joint rates is unjust, inequitable or unduly preferential or prejudicial as *between carriers thereto*, it shall by order prescribe just, reasonable and equitable divisions thereof to be received by the *several* carriers. The statute plainly contemplates that when the divisions of joint rates are attacked *all* the carriers who are parties to those joint rates must be made parties to the case so that the rights and interests of all may be fully and adequately protected.

All the carriers who are parties to joint through rates are necessarily interested in the divisions of those rates; for if one carrier, upon a complaint, is found to be entitled to an increase, then all the other carriers to those joint rates should be made parties so that the remainder of the revenue might be equitably divided between them.

On this question the Interstate Commerce Commission in its brief said (p. 51):

“As to joint rates which extended beyond the lines of the Orient and its direct connections—that is to say, joint rates in which other railroads participated—the Commission did not change the divisions received by the other carriers, but considered and reapportioned only that part of the revenue which accrued jointly to the Orient and each of its direct connections for the part of the service which they jointly performed.”

It is true that the Commission required the carriers directly connecting with the Orient to stand the whole burden of furnishing it operating expenses, but the point we are making now is that under the statute, all the carriers who are parties to the joint rates *must be made parties* defendants or respondents in the proceeding before the Commission. It may be that after they have been made parties, the Commission can decide that *only* the connecting carriers should contribute but *before proceeding with the case*, it is our contention that *all the carriers* who were parties to the joint rates should be before the Commission. *This was done in the New England case.*

Thirty-nine carriers were joined, twenty-six of whom do not directly connect with the Orient, but as shown in the record, there are scores of other carriers who participate in the same joint rates with the Orient and its immediate connections and who were not brought in as defendants or respondents. The statute plainly contemplates that they should.

A proceeding of this kind is similar to a case wherein a shipper is attempting to prove the unreasonableness of joint rates to which several carriers are parties. The Commission has frequently held that under such circumstances it is necessary for complainants to *join as defendant all the carriers who participate* in the movement of the traffic *under those joint rates.*

In Stevens Grocer Company et al. v. St. Louis, Iron Mountain & Southern Ry. Co. et al., 42 I. C. C. 396, 397, 296, the Commission said:

"At the hearing defendant objected to the sufficiency of the complaint because the various parties to the movement out of Memphis were not named as defendants. Numerous cases were referred to by the parties as supporting their contentions that it is, or is not, proper and necessary to bring in issue the through rate of charge and to name the various parties thereto, *before attacking a particular rate of charge or rates of charge.* In the past the procedure in this respect has been varied somewhat, dependent upon the circumstances of the case. It is important that the true rule be definitely announced and that a uniform policy be established under which parties complainant and defendant may understand what is required. We now lay down the rule, which for the future will be strictly adhered to, that when a complaint involves charges applicable to a through shipment the through rate or rates named for bringing in issue *and the particular carriers named for such defendants.*"

In McNease Bros. of Beaumont, Tex., et al. v. St. Louis, S. & M. Ry. Co. et al., 43 I. C. C. 696, the Commission declined to exercise jurisdiction for the reason that the complaint did not join other carriers who were parties to the joint rate agreement. The Commission said (696):

"On the hearing it developed that the points to which complainants ship vegetables in bulk are

St. Louis and Kansas City, Missouri; Chicago, Illinois, and downstream out of the Mississippi River and north of the Ohio River. The connecting and alleviating canals beyond the State of Texas are *subject to the law of admiralty* concerning the rules and/or attack. No complaint is made against those canals, and they have not been closed. The complainant will, therefore, be dismissed, but without prejudice. The order will issue accordingly.¹⁰

The Board of Trade of the City of Chicago v. Illinois C. R. Co., 36 L. R. C. 386, 395, the Commission will:

"Complainant asks that no additional just and reasonable rates from Chicago to Chicago or greater than five percent, but neither the amount from the above nor the scope of the complaint, to attack but one interested carrier is a justly defendant, afford justification for instituting an injunction which has long maintained for all years."¹¹

In the case of Illinois Central Railroad Company v. Chicago, 36 L. R. C. 42 L. R. C. 806, the Commission found that lower rates on coal from Mikell, Illinois, to Louisville junction than from Indianapolis, Indiana, were clearly unfair to Indianapolis, but no order was entered by the Commission in that case that the reason that the Illinois Central was not making a parity adjustment.

In the case of J. Allen Smith & Co. v. Southern Ry. et al., 48 I. C. C. 647, the complaint attacked a rate on wheat from Chicago, Illinois, via New Albany, Indiana, to Knoxville, Tennessee, milled, the products reshipped to various points in Carolina territory, as unreasonable and discriminatory. No carrier operating from Chicago to New Albany was named as a party. The Commission held that it was powerless under these circumstances to make an order for the reason that necessary party had not been made defendant, and the complaint was dismissed.

In another case, a complainant attacked a rate on coal, ashes and cinders shipped from Coatesville, Pennsylvania, to Carney's Point, New Jersey, as unreasonable. The shipments originated at a plant located on the rails of the P. & R. Railway Co. in Coatesville, and were shipped by that carrier to a point of interchange with the Pennsylvania Railroad, a charge of 20 cents per ton being made for the service, which was absorbed by the Pennsylvania Railroad. The P. & R. Railway Company was not named a party defendant, nor was the switching charge assailed. The Commission held that under the facts the P. & R. Ry. Co. was a necessary party defendant, and as it was not joined, the Commission found it necessary to dismiss the complaint.

Du Pont de Nemours P. Co. v. Pennsylvania R.,
43 I. C. C. 227.

In Cement Rates Between Points in Illinois and Points in Minnesota, 32 I. C. C. 369, it was alleged that the general system of rates was unduly discriminatory, but the Commission held that the question of undue discrimination was not before it, and that the determination of that question could only with propriety be made on a record where by the complaint the issue was raised and where *all the interested carriers were defendants.*

In Griffing v. Chicago & N. W. R., 25 I. C. C. 134, the Commission decided that it had jurisdiction to deal only with those carriers which are parties to the proceeding.

In Star Grain & Lbr. Co. et al. v. Atchison, T. & S. F. et al., 14 I. C. C. 364, the Commission seems to have *specifically passed upon the question the defendants are raising in this case.* The Commission said (371):

"The division here fixed is for the haul to Fort Worth from mill points on the rails of the Cotton Belt and its subsidiary line, the Eastern Texas Railroad Company, which is a party defendant hereto. But it is not to be understood as including any allowance to the so-called tap lines. These companies are not parties to this proceeding and for that reason no order affecting them, or fixing a rate for any services claimed to be performed by them, can properly be en-

tered. Moreover, even if they were parties to the complaint the record contains no testimony that would enable us intelligently to extend to them any portion of this division for the haul south of Fort Worth."

VI.

ORDER IS INVALID BECAUSE INCIDENTAL FACT OF PHYSICAL CONNECTION WITH ORIENT WAS MADE THE SOLE TEST IN DETERMINING WHO SHOULD CONTRIBUTE AND WHO SHOULD NOT CONTRIBUTE.

Appellees contend that if the Commission has the power to increase divisions of joint rates in order to pay the operating expenses of one carrier, then an order requiring the revenues to be transferred *solely* from those carriers who happen to have physical connection with the Orient, is arbitrary and unlawful.

Thirty-nine carriers were made respondents in the proceeding before the Commission. The Commission found that the divisions of thirteen of them were unlawful and ordered that they be depleted by certain percentages and that the amount so deducted be added to the divisions of the Orient. However, Exhibit No. 24 (Rec., pp. 313-325) shows that there are scores of carriers who are parties to the joint rates with the Orient and who were not required to decrease their divisions in order that the Orient may

have sufficient revenues to pay its operating expenses. For example, on intermediate traffic moving over the Orient System during the year 1921 the following carriers received the sums set opposite each from divisions under joint rates with the Orient System:

Arizona & Eastern.....	\$27,926.73
Chicago, Burlington & Quincy.....	61,656.34
Chicago, Milwaukee & St. Paul.....	41,395.23
Chicago Great Western.....	14,488.11
Chicago & Northwestern.....	8,812.61
Chicago & Alton.....	20,590.83
El Paso & Southwestern.....	19,544.79
Pan Handle & Santa Fe.....	25,291.48
Pacific Electric	55,615.50
Wabash	53,124.30
International-Great Northern	40,807.50

Again, on traffic forwarded from the Orient during the year 1921 the following carriers who were parties to joint rates with the Orient received as divisions the following sums set opposite each:

Chicago, Burlington & Quincy.....	\$13,474.55
Cisco & Northeastern.....	2,422.72
Colorado & Southern.....	4,135.99
Fort Worth & Rio Grande.....	11,001.20
Houston & Texas Central.....	5,532.59
Illinois Central	4,501.82
Kansas City Southern.....	3,337.62
Louisiana Railway & Navigation Company	8,214.29
Morgan's Louisiana & Texas Railroad..	9,462.36
Panhandle & Santa Fe.....	21,189.02

St. Louis Southwestern of Texas.....	4,156.41
San Antonio & Aransas Pass.....	3,956.86
Southern Pacific	23,334.50
Trinity & Brazos Valley.....	6,381.28
Wabash	5,910.38
Wiehita Valley	6,058.35

On traffic received by the Orient under joint rates the following carriers received as divisions the sums set opposite each:

Chicago & Alton	\$ 2,187.49
Chicago, Burlington & Quincy.....	8,116.79
Chicago, Milwaukee & St. Paul.....	7,173.69
Chicago, Rock Island & Gulf.....	10,026.27
Colorado Southern	70,779.81
Denver & Rio Grande.....	22,065.53
International-Great Northern	5,124.23
Kansas City Southern.....	10,721.54
Missouri, Kansas & Texas.....	17,445.86
Northwestern Pacific	7,085.08
Oregon W. R. R. & N.....	5,636.88
Southern Pacific	136,956.23
Union Pacific	12,474.70
Wabash	4,501.80
Wiehita Valley	11,105.34

The foregoing facts are shown in Exhibit No. 24 (Rec., pp. 313-325). None of the foregoing carriers were required to deplete their revenues under their divisions with the Orient Railway. It is manifestly unfair and arbitrary to require that the divisions of the connecting carriers *only* be depleted in order to

defray the operating expenses of the Orient Railway and we submit that the order is invalid on this ground alone.

For the foregoing reasons appellees respectfully submit that the judgment of the lower court should be affirmed.

Respectfully submitted,

W. F. EVANS,

M. G. ROBERTS,

Attorneys for St. Louis-San
Francisco Railway Company.

Frisco Bldg.,

St. Louis, Mo.

February 16, 1924.

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION *v.* ABILENE & SOUTHERN RAIL-
WAY COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF KANSAS.

No. 456. Argued March 4, 1924.—Decided May 26, 1924.

1. An order made by a division of the Interstate Commerce Commission being operative, unless stayed by the division or the full Commission pending a rehearing by the latter, (amended Act to Regulate Commerce, §§ 16a, 17 [4],) a suit to enjoin enforcement of such an order is within the jurisdiction of the District Court, and whether relief should be denied until the plaintiff, through application for rehearing, shall have exhausted the administrative remedy, is a matter of judicial discretion. P. 280.
2. In a proceeding under § 15 (6) of the amended Interstate Commerce Act in which the Commission readjusted the divisions of joint rates as between a carrier and its several immediate con-

nnections, the other carriers participating in the joint rates, whose shares were left unchanged, were not necessary parties. P. 282.

3. In determining just divisions, the Commission must consider relative cost of service; whether a particular carrier is an originating, intermediate or delivering line; the efficiency of operation of each carrier; the revenue it requires for operation expenses, taxes and a fair return; public importance of the transportation services involved; and any other facts which would ordinarily, without regard to mile haul, entitle one carrier to a greater or less proportion than another. P. 284.
4. The financial needs of a weaker road may also be taken into consideration in determining divisions of joint rates. *Id.*
5. The mere fact that increased divisions allowed a carrier were measured by percentages of the revenues of the several connecting carriers from the joint traffic, does not establish that the division is unjust or guided solely by relative financial ability. P. 285.
6. An order increasing the divisions of a carrier is not arbitrary merely because the corresponding decreases are confined to the carriers immediately connecting with it, these having the right to apply for further readjustment as between themselves and remoter carriers. P. 286.
7. An order of the Commission is not invalidated by the mere admission as evidence of matter which in judicial proceedings would be incompetent. P. 288.
8. But a finding without evidence is beyond the power of the Commission. *Id.*
9. Reports of carriers on the Commission's files cannot be treated as evidence when not introduced as such, in a proceeding which, though initiated by the Commission primarily to protect the public interest, may result in an order in favor of one carrier as against another. *Id.*
10. Rule XIII of the Commission does not purport to relieve the Commission from introducing, by specific reference, such parts of the reports of carriers, properly on file, as it wishes to treat as evidence. P. 289.
11. The right of carriers to insist that consideration by the Commission of matter not in evidence invalidates its order is not lost by their submission of the case without argument or their consent to omission of a tentative report by the examiner. *Id.*
12. A general notice given at the hearing by an examiner that the Commission would rely upon voluminous annual reports previously

filed with the Commission by plaintiff carriers pursuant to law, held tantamount to no notice whatever of evidence used against them. P. 289.

13. The divisions of joint rates may be determined on the basis of individual rates and divisions, shown by tariffs and division sheets and found sufficiently typical in character and ample in quantity to justify findings as to each division of each rate of every carrier involved, (*New England Divisions Case*, 261 U. S. 184;) but it cannot be inferred because the joint rates and divisions between particular carriers work injustice in the aggregate, that each particular division of each rate is unjust, and in like proportion. P. 290.

288 Fed. 102, affirmed.

APPEAL from a decree of the District Court perpetually enjoining the enforcement of an order of the Interstate Commerce Commission.

Mr. Clifford Histed, with whom *Mr. E. A. Boyd* was on the brief, for Kemper, Receiver of the Kansas City, Mexico & Orient Railroad Company, and Kansas City, Mexico & Orient Railway Company of Texas, interveners.

Mr. T. J. Norton and *Mr. M. G. Roberts*, with whom *Mr. Gardiner Lathrop* and *Mr. W. F. Evans* were on the briefs, for appellees.

Mr. J. Carter Fort, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

Bringing suit before applying for a rehearing by the full Commission was not the "proper and orderly course," and was not in keeping with "equitable fitness and propriety." *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210. This Court should not be called upon to review orders of a division of the Commission, which the full Commission has authority to rehear and reverse (Interstate Commerce Act, §§ 16a, 17[4]), unless application has been made for such rehearing.

The question of the reasonableness of divisions was properly before the Commission.

The Commission, in fixing divisions, may consult, in the public interest, the financial needs of the carriers, and is

not restricted to a consideration of the amount and cost of transportation service performed by each carrier. Interstate Commerce Act, § 15(6); *New England Divisions Case*, 261 U. S. 184; *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456; *United States v. Illinois Central R. R. Co.*, 263 U. S. 515.

The fact that the Commission considered certain information shown in the annual reports made by appellees to the Commission, which were not formally introduced in evidence, does not invalidate its order.

During the early part of the hearing, the examiner announced that the Commission would refer to these reports in its consideration of the case. The record leaves no doubt that his statement was well understood at the time.

What the Commission did was not in violation of Rule XIII.

The Commission is not bound by strict and technical rules of evidence such as prevail in the law courts. *Interstate Commerce Comm. v. Baird*, 194 U. S. 25; *Interstate Commerce Comm. v. Louisville & Nashville R. R. Co.*, 227 U. S. 88; *Spiller v. Atchison, etc., Ry. Co.*, 253 U. S. 117; *Interstate Commerce Comm. v. Chicago, etc., Ry. Co.*, 218 U. S. 88.

The evidence showed, for the period of a year, the amount of service jointly performed by the Orient and each of its connections, and the part of such service performed by each; the joint revenue arising from the joint service and how it was divided.

In this case the Commission came much nearer to specific treatment than in the *New England Divisions Case*, because here it dealt separately with each connection and considered, as between it and the Orient, the relative aggregate services and revenues therefrom and the relative average revenues per ton-mile.

The Commission made adequate provision to correct injustices which might be found to arise from the compe-

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hensive manner in which it was necessary to deal with the subject. See *Wisconsin R. R. Comm. v. Chicago, etc. R. R. Co.*, 257 U. S. 563; *New England Divisions Case, supra*. It retained jurisdiction of the case for the express purpose of making such modifications of its order.

The Commission's finding did not rest solely upon evidence relating to the financial needs of the Orient and its several connections; the evidence relating strictly to transportation matters tended to show that the Orient's divisions were unjust.

The Court will not examine the facts further than to determine whether there was substantial evidence to sustain the order. *Interstate Commerce Comm. v. Union Pacific R. R. Co.*, 222 U. S. 541; *New England Divisions Case*, 261 U. S. 184.

The Commission is an expert body, informed by experience in matters of rates and railroad statistics. Its findings are fortified by presumptions of truth. *O'Keefe v. United States*, 240 U. S. 294; *Interstate Commerce Comm. v. Chicago, etc. Ry. Co.*, 218 U. S. 88; *New England Divisions Case, supra*.

The order is not arbitrary because the divisions of certain appellees were decreased by greater percentages than the divisions of others.

There is no showing that the Commission's order will result in confiscation. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1.

Mr. Solicitor General Beck, Mr. Blackburn Esterline, Assistant to the Solicitor General, and *Mr. Clifford Histed*, Special Assistant to the Attorney General, filed a brief on behalf of the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is an appeal by the United States and the Interstate Commerce Commission from a decree of the federal

court for Kansas which perpetually enjoined the enforcement of an order made by the Commission, on August 9, 1922, under § 15(6) of the Interstate Commerce Act, as amended by Transportation Act, 1920, c. 91, § 418, 41 Stat. 456, 486. The order relates to the divisions of interstate joint rates on traffic interchanged, within the United States, by the Kansas City, Mexico & Orient system with thirteen carriers whose lines make direct connection with it. The order provides that on all such interchanged traffic the existing divisions of these carriers shall be reduced by a fixed per cent.; and that the Orient shall receive the amount so taken from its connections.¹ The order, also, directed the Orient and the connecting carriers to make, at stated intervals, reports of the financial results of the divisions ordered; permitted any carrier to except itself from the order, in whole or in part, by proper showing; and retained jurisdiction in the Commission "to adjust on basis of such reports the divisions herein prescribed or stated, if such adjustment shall to us seem proper." *Kansas City, Mexico & Orient Divisions*, 73 I. C. C. 319, 329.

The order was entered after an investigation into the financial needs of the Orient system, undertaken by the

¹ The percentage of the reduction prescribed in respect to the several carriers ranges from 10 to 30 per cent. Thus, the Missouri Pacific's division was shrunk 20 per cent. It was estimated that the resulting reduction of its revenues would be \$115,789.22. That amount, added to the existing share of the Orient on this traffic, would increase its division, on weighted average, over 14%. The Texas & Pacific's division was also shrunk 20%. The estimated resulting reduction of its revenues would be \$121,140.81. But that amount added to the existing share of the Orient on this traffic would increase its division about 25%. The order differs from that upheld in *New England Divisions Case*, 261 U. S. 184, which prescribed a per cent. age increase of the division of the New England roads and directed that the amount of the increase be taken from the existing shares of the several connecting carriers.

Commission in April, 1922, pursuant to an application of the receiver of the Kansas City, Mexico & Orient Railroad Company and an affiliated Texas corporation. It appeared (and was not denied) that the public interest demanded continued operation of the railroad; that the revenues were insufficient to pay operating expenses; that the operation was being efficiently conducted; and that unless relief were afforded by increasing the Orient's division of joint rates and/or otherwise, operation would have to be suspended and the railroad abandoned.² The thirteen carriers who brought this suit participated in the investigation undertaken by the Commission; and supplied certain statistical information requested of them. But they introduced no evidence before the Commission; and the case was submitted there without argument. None of the connecting carriers made application to be excepted from the order. Nor did any of them apply for a rehearing. Before the effective date of the order, this suit was begun. On application for a temporary injunction, it was heard by three judges, pursuant to the Act of October 22, 1913, c. 32, 38 Stat. 208, 220; and a temporary injunction was granted. Upon final hearing, motions of the defendants to dismiss the bill were denied; the injunction was made permanent; and a rehearing was refused. 288 Fed. 102.

First. The Commission moved, in the District Court, to dismiss the bill on the ground that the suit was premature. The contention is that, under the rule of *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, orderly procedure required that, before invoking judicial review, the

² These needs had been the subject of repeated enquiries by the Commission in connection with the granting and the renewal of a loan from the United States under § 210 of Transportation Act, 1920. *Loan to Kansas City, Mexico & Orient Railroad*, 65 I. C. C. 36; *ibid.*, 265; 67 I. C. C. 23; *Loan to the Receiver of Kansas City, Mexico & Orient Railroad*, 70 I. C. C. 639; *ibid.*, 646.

carriers should have exhausted the administrative remedy afforded by a petition for rehearing before the full Commission. The investigation and order were made, not by the whole Commission, but by Division 4.³ The order of a division has "the same force and effect . . . as if made . . . by the commission, subject to rehearing by the commission." Interstate Commerce Act as amended, § 17(4). Any party may apply for such rehearing of any order or matter determined. § 16a. Meanwhile, the order may be suspended either by the Division or by the Commission. In this case, the order, by its terms, was not to become effective until 37 days after its entry. There was, consequently, ample time within which to apply for a rehearing and a stay, before the plaintiffs could have been injured by the order.

Division 4 consists of four members. There are eleven members on the full Commission. Under these circumstances, what is here called a rehearing resembles an appeal to another administrative tribunal. An application for a rehearing before the Commission would have been clearly appropriate.⁴ The objections to the validity of the order now urged are in part procedural. They include

³ See Interstate Commerce Act as amended, § 17; Annual Report of the Commission (1920), pp. 3-6; *Chicago Junction Case*, 264 U. S. 258, 261, note 3.

⁴ See Rules of Practice before the Commission, 1916, pp. 16, 23; 1923, pp. 18, 28. For instances of cases which were heard by a Division and later reheard by the Commission, see: *E. I. Dupont de Nemours Powder Co. v. Houston & Brazos Valley R. R. Co.*, 47 I. C. C. 221; 52 I. C. C. 538; *Rockford Paper Box Board Co. v. Chicago, M. & St. P. Ry. Co.*, 49 I. C. C. 586; 55 I. C. C. 262; *Steinhardt & Kelly v. Erie R. R. Co.*, 52 I. C. C. 304; 57 I. C. C. 369; *Quinton Spelter Co. v. Fort Smith & Western R. R. Co.*, 53 I. C. C. 529; 61 I. C. C. 43; *Empire Steel & Iron Co. v. Director General*, 56 I. C. C. 158; 62 I. C. C. 157; *John Kline Brick Co. v. Director General*, 63 I. C. C. 439; 77 I. C. C. 420.

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questions of joinder of parties, of the admissibility of evidence, and of failure to introduce formal evidence. Most of the objections do not appear to have been raised before the Division. If they had been, alleged errors might have been corrected by action of that body or by the full Commission. The order involved also a far-reaching question of administrative power and policy which, so far as appears, had never been passed upon by the full Commission, and was not discussed by these plaintiffs before the Division. In view of these facts, the trial court would have been justified in denying equitable relief until an application had been made to the full Commission, and redress had been denied by it. But, in the absence of a stay, the order of a division is operative; and the filing of an application for a rehearing does not relieve the carrier from the duty of observing an order.⁵ Despite the failure to apply for a rehearing, the court had jurisdiction to entertain this suit. *Prendergast v. New York Telephone Co.*, 262 U. S. 43, 48, 49. Compare *Chicago Rys. Co. v. Illinois Commerce Commission*, 277 Fed. 970, 974. Whether it should have denied relief until all possible administrative remedies had been exhausted was a matter which called for the exercise of its judicial discretion. We cannot say that, in denying the motion to dismiss, the discretion was abused.

Second. The plaintiffs contend that the order is void, because only a part of the carriers who participated in the joint rates were made parties to the proceedings before the Commission. Section 15(6) provides that where existing divisions are found to be "unjust . . . as between the carriers parties thereto . . . the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several

⁵ See Interstate Commerce Act as amended, § 16a.

carriers." More than 170 carriers participated in the joint rates in question. Of these only 39 carriers, whose roads lie wholly west of the Mississippi River, were made respondents before the Commission. The argument is that all who are parties to the through rates are necessarily interested in the divisions of those rates; that failure to join some is not rendered immaterial by the fact that the order made affects directly only those before the Commission, since it would be open to a carrier whose division is reduced, to seek contribution later by a proceeding to readjust the divisions as between it and other carriers who were not parties to the original case; and that an order under this section is invalid unless it disposes completely of the matter in controversy. This argument is answered by what was said in *New England Divisions Case*, 261 U. S. 184, 201, 202. The order, in terms, affects only the 13 carriers whose lines connect directly with the Orient system. Only their divisions were reduced. The shares of all others who participated in the joint rates were left unchanged. All participating carriers might properly have been made respondents. But that was not essential. For it was not necessary that all controversies which may conceivably arise should be settled in a single proceeding. There was no defect of parties in the proceeding before the Commission.⁶

* The case is wholly unlike those in which it is held that where a shipper attacks a through rate all participating carriers must be made respondents, even though the through rate is made up of separately established elements. The complainant may wish to direct his attack only against one of these. But it is only the through rate which is in issue. It may be reasonable although one of its elements is not. It must stand or fall as an entirety. See *Stevens Grocer Co. v. St. Louis, Iron Mountain & Southern Ry. Co.*, 42 I. C. C. 396, 398; *McDavitt Bros. v. St. Louis, Brownsville & Mexico Ry. Co.*, 43 I. C. C. 695; *La Crosse Shippers' Assoc. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 43 I. C. C. 605, 607; *E. I. Dupont de Nemours Powder Co. v. Pennsylvania R. R. Co.*, 43 I. C. C. 227. Compare *Star Grain & Lumber*

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Third. The plaintiffs contend that the order is void because made on a basis which Congress did not and could not authorize.⁷ The argument is that Transportation Act, 1920, requires earnings under joint rates to be divided according to what is fair and reasonable as between the parties; that what is so must be determined by the relative amount and cost of the service performed by each of the several railroads; and that the Commission, ignoring this basis of apportionment and making the determination in the public interest, gave to the needy Orient system larger divisions merely because the connecting carriers were more prosperous. Relative cost of service is not the only factor to be considered in determining just divisions. The Commission must consider, also, whether a particular carrier is an originating, intermediate or delivering line; the efficiency with which the several carriers are operated; the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property; the importance to the public of the transportation service of such carriers; and other facts, if any, which would, ordinarily, without regard to mileage haul, entitle one carrier to a greater or less proportion than another of the joint rate.⁸ It is settled that in determining what the divisions should be, the Commission may, in the public interest, take into consideration the financial needs of a weaker road; and that it may be

Co. v. Atchison, T. & S. F. Ry. Co., 14 I. C. C. 364, 371; *Indianapolis Chamber of Commerce v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 46 I. C. C. 547, 556; *Johnson & Son v. St. Louis-San Francisco Ry. Co.*, 51 I. C. C. 518, 520.

⁷ Compare *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, 443; *New England Divisions Case*, 261 U. S. 184, 189; *United States v. Illinois Central R. R. Co.*, 263 U. S. 515, 525.

⁸ Compare *New England Divisions Case*, 261 U. S. 184, 193-195; *Wichita Northwestern Ry. Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 81 I. C. C. 513, 517.

given a division larger than justice merely as between the parties would suggest "in order to maintain it in effective operation as part of an adequate transportation system," provided the share left to its connections is "adequate to avoid a confiscatory result." *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456, 477; *New England Divisions Case*, 261 U. S. 184, 194, 195. It was not contended before the Commission that a reduction of the carriers' divisions would reduce their rates below what is compensatory.⁹ There is in the record no evidence on which it could be determined that any of the divisions ordered will result in confiscatory rates. And there is nothing in the order which prohibits rate increases. Compare *United States v. Illinois Central R. R. Co.*, 263 U. S. 515, 526.

The assertion is made that the Commission was guided solely by the relative financial ability of the several carriers. In support of this assertion it is pointed out that the increase ordered of the Orient's share was measured, not by a percentage of its own divisions, as in *New England Divisions Case*, 261 U. S. 184, but by a percentage of the revenues of the several connecting carriers from the joint traffic.¹⁰ It does not follow that such a basis of division would necessarily be unjust to the connecting carriers. The position of the Orient as the originating carrier, or as the delivering carrier, or as an indis-

⁹ These joint rates had been recently raised. *Increased Rates, 1920, Ex parte 74*, 58 I. C. C. 220. There were reductions later. See *Reduced Rates, 1922*, 68 I. C. C. 676; 69 I. C. C. 138.

¹⁰ This, they illustrate by an hypothetical case of a \$1 rate from a station on the Orient to a station on the Santa Fe for which existing divisions are 20 cents to the Orient and 80 cents to the Santa Fe. An increase of the Orient's division 25 per cent. would have reduced the Santa Fe's division only 6 1/4 per cent.; while the order made, by reducing the Santa Fe's division 25 per cent., increases that of the Orient 100 per cent.

pensable intermediate carrier, might be such that the connecting carrier could not get the traffic but for the service which the Orient renders; and that this factor, together with others ignored in the existing divisions, would require the precise change directed to render the divisions just and reasonable as between the parties. It is, also, pointed out that the contributions to be made by the connecting carriers bore a direct relation to their prosperity. But it does not appear that the Commission based its finding solely on the financial needs of the Orient and the financial condition of the connecting carriers.

Invalidity of the order is urged on the further ground that the Commission made the incidental fact of physical connection with the Orient the sole test for determining which carriers should have their divisions reduced; and that such action is clearly arbitrary. It is true that the order affects, in terms, only the 13 carriers whose lines have direct connection with the Orient; but it does not follow that the action was arbitrary. These connecting carriers have a demonstrable interest in having the operation of the Orient continued. Other carriers doubtless have an interest; but it is less certain. It is open to any of these 13 carriers to institute proceedings before the Commission with a view to securing a partial distribution of their burden among other connecting carriers. Compare *United States v. Illinois Central R. R. Co.*, 263 U. S. 515, 526. The basis of division adopted by the Commission is not shown to be, in any respect, inconsistent with the rule declared in *New England Divisions Case*, 261 U. S. 184. Nor is it shown that the Commission ignored any factor of which consideration is required by the act.

Fourth. The plaintiffs contend that the order is void because it rests upon evidence not legally before the Commission. It is conceded that the finding rests, in part,

upon data¹¹ taken from the annual reports filed with the Commission by the plaintiff carriers pursuant to law; that these reports were not formally put in evidence; that the parts containing the data relied upon were not put in evidence through excerpts; that attention was not otherwise specifically called to them; and that objection to the use of the reports, under these circumstances, was seasonably made by the carriers and was insisted upon. The parts of the annual reports in question were used as evidence of facts which it was deemed necessary to prove, not as a means of verifying facts of which the Commission, like a court, takes judicial notice. The contention of the Commission is that, because its able examiner gave notice that "no doubt it will be necessary to refer to the annual reports of all these carriers," its Rules of Practice¹² permitted matter in the reports to

¹¹ These include for each of the carriers the data showing for the year freight tons, one mile; passengers, one mile; all revenue car miles; all revenue train miles; the total operating revenue; total operating expenses; net revenue and investment in road and equipment; and they involved calculation of the respective gross revenues per ton mile, per car mile, per train mile; operating expenses per train mile, per car mile, per ton mile; net revenue per ton mile, per car mile, per train mile; the return per \$1,000 of investment, on the gross revenue, the net revenue and the railway operating income; the percentage of return on the gross revenue, the net revenue and the operating income. The net railway operating income for each of the lines is in the record.

¹² Rule XIII, as in force prior to the Revision of December 10, 1923, provides, in part:

"Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evidence, such document will not be received, but the party offering the same shall present to opposing counsel and to the Commission true copies of such material and relevant matter, in proper form, which may be received in evidence and become part of the record.

"In case any portion of a tariff, report, circular, or other document on file with the Commission is offered in evidence, the party

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be used as freely as if the data had been formally introduced in evidence.

The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent does not invalidate its order. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44; *Spiller v. Atchison, Topeka & Santa Fe Ry. Co.*, 253 U. S. 117, 131. Compare *Bilokumsky v. Tod*, 263 U. S. 149, 157. But a finding without evidence is beyond the power of the Commission. Papers in the Commission's files are not always evidence in a case. *New England Divisions Case*, 261 U. S. 184, 198, note 19. Nothing can be treated as evidence which is not introduced as such. *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91, 93; *Chicago Junction Case*, 264 U. S. 258. If the proceeding had been, in form, an adversary one commenced by the Orient system, that carrier could not, under Rule XIII, have introduced the annual reports as a whole. For they contain much that is not relevant to the matter in issue. By the terms of the rule, it would have been obliged to submit copies of such portions as it deemed material; or to make specific reference to the exact portion to be used. The fact that the proceeding was technically an investigation instituted by the Commission

offering the same must give specific reference to the items or pages and lines thereof to be considered. The Commission will take notice of items in tariffs and annual or other periodical reports of carriers properly on file with it or in annual, statistical, and other official reports of the Commission. When it is desired to direct the Commission's attention to such tariffs or reports upon hearing or in briefs or argument it must be done with the precision specified in the second preceding sentence. In case any testimony in other proceedings than the one on hearing is introduced in evidence, a copy of such testimony must be presented as an exhibit. When exhibits of a documentary character are to be offered in evidence copies should be furnished opposing counsel for use at the hearing."

would not relieve the Orient, if a party to it, from this requirement. Every proceeding is adversary, in substance, if it may result in an order in favor of one carrier as against another. Nor was the proceeding under review any the less an adversary one, because the primary purpose of the Commission was to protect the public interest through making possible the continued operation of the Orient system. The fact that it was on the Commission's own motion that use was made of the data in the annual reports is not of legal significance.

It is sought to justify the procedure followed by the clause in Rule XIII which declares that the "Commission will take notice of items in tariffs and annual or other periodical reports of carriers properly on file". But this clause does not mean that the Commission will take judicial notice of all the facts contained in such documents. Nor does it purport to relieve the Commission from introducing, by specific reference, such parts of the reports as it wishes to treat as evidence. It means that as to these items there is no occasion for the parties to serve copies. The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties.¹³

The right of the carriers to insist that the consideration of matter not in evidence invalidates the order was not lost by their submission of the case without argument and

¹³ Its observance will not hamper the Commission in the performance of its duties. For, if the materiality of some fact in a report is not discovered by the Commission until after the close of the hearing, there is power to reopen it for the purpose of introducing the evidence.

by their acquiescing in the suggestion that the presentation of a tentative report by the Examiner be omitted. While the course pursued denied to the Commission the benefit of that full presentation of the contentions of the parties which is often essential to the exercise of sound judgment, it cannot be construed as a waiver by the carriers of their legal rights. The general notice that the Commission would rely upon the voluminous annual reports is tantamount to giving no notice whatsoever. The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void.

Fifth. A further objection of the carriers should be considered. They point out that the record does not contain any tariffs showing the individual joint rates, or any division sheets showing how these individual joint rates are divided, nor any information concerning the amount of service performed by the Orient and its several connections under such individual joint rates. As justification for this omission, it is argued that there are in the record exhibits, furnished by the several carriers, containing data from which the Commission could reach a conclusion as to whether or not the divisions, taken as a whole, were equitable as between the Orient and its several connections¹⁴; that in a general rate case, evidence

¹⁴ The exhibits showed for the year 1921, the volume of traffic moving on joint rates and interchanged between the Orient and each of its direct connections; the part of the joint service performed by the Orient and the part performed by its connection; the revenue arising from the joint service, and how that revenue was divided. For example: The exhibits showed that, during 1921, the Santa Fe and the Orient interchanged 26,278 tons of freight; that with respect to such freight the Orient performed 8,162,294 ton miles of transportation and the Santa Fe 5,793,098 ton miles; that the revenue arising from this joint service was \$218,827.71, of which the Orient received \$106,889.59 and the Santa Fe \$111,938.12; that the per ton mile revenue of the Orient was 1.309 cents and the per ton mile revenue of the Santa Fe 1.932 cents.

"deemed typical of the whole rate structure" will support a finding as to each rate in the structure by raising a rebuttable presumption concerning each rate; that typical "evidence" in this sense means, not evidence directly representative of every individual rate, but evidence tending to show the general situation; that a like presumption arises in a division case; that the data dealing with the traffic in the aggregate, which was furnished by the exhibits, constituted such typical evidence; that, in this proceeding, information concerning individual rates and divisions was not essential; and that the course pursued by the examiner is, in substance, that upheld in the *New England Divisions Case*, 261 U. S. 184, 196-199.

The argument is not sound. The power conferred by Congress on the Commission is that of determining, in respect to each joint rate, what divisions will be just. Evidence of individual rates or divisions, said to be typical of all, affords a basis for a finding as to any one. But averages are apt to be misleading. It cannot be inferred that every existing division of every joint rate is unjust as between particular carriers, because the aggregate result of the movement of the traffic on joint rates appears to be unjust. These aggregate results should properly be taken into consideration by the Commission; but it was not proper to accept them as a substitute for typical evidence as to the individual joint rates and divisions. In the *New England Divisions Case*, tariffs and division sheets were introduced which, in the opinion of the Commission were typical in character, and ample in quantity, to justify the findings made in respect to each division of each rate of every carrier. A like course should have been pursued in the proceeding under review.

Affirmed.